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In the

Supreme Court of the United States

OCTOBER TERM, 1980

OUTBOARD MARINE CORPORATION,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
(by William J. Scott, Attorney General),
UNITED STATES OF AMERICA,

and

MONSANTO COMPANY,

Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, OUTBOARD MARINE CORPORATION, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED

1. Whether the federal common law has been displaced by enactment of a comprehensive statutory and regulatory scheme in the Clean Water Act.

2. Whether the federal common law of nuisance should be extended to a controversy which does not involve an inter-state dispute.

3. Whether a citizen is permitted to intervene as a matter of right under Section 505(b)(1)(B) of the Clean Water Act (33 U.S.C. §1365(b)(1)(B)) where the relief sought by the federal government is the removal of alleged contaminants rather than compliance with an effluent standard, limitation or order.

4. Whether the Court of Appeals properly allowed the state Attorney General to choose between maintaining a separate suit, or intervening in the pending case brought by the United States government, when the Clean Water Act provides for a right to intervene only when the statute prohibits a separate citizen's suit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, published on March 28, 1980, is as yet unreported, and is reproduced herein as Appendix A. The order of the court denying a petition for rehearing is reproduced herein as Appendix B. The memorandum opinions and orders of the United States District Court for the Northern District of Illinois, rendered on May 29, 1979 and February 28, 1979, which were reversed by the Court of Appeals, are unpublished and appear herein as Appendices C and D.

JURISDICTION

The Court of Appeals for the Seventh Circuit issued its judgment on March 28, 1980. On April 29, 1980, the court denied petitioner's timely filed petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §§1254 and 2101(c).

STATUTORY PROVISIONS INVOLVED

33 U.S.C. §1251 *et. seq.*

33 U.S.C. §1365(b)(1)(B) provides in pertinent part:

> (b) No action may be commenced -
>
> (1) Under subsection (a) (1) of this section -
>
> (b) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in any court of the United States any citizen may intervene as a matter of right.

STATEMENT OF THE CASE

The consolidated appeals of the Illinois Attorney General to the Court of Appeals are a part of several related proceedings in the United States District Court for the Northern District of Illinois. On March 1, 1978, Outboard Marine Corporation ("OMC") filed suit against the Administrator of the United States Environmental Protection Agency ("EPA"). OMC there is claiming that the environmental agencies have failed to properly perform their responsibilities under the Clean Water Act, including with respect to Waukegan Harbor. That case (78 C 751) is awaiting trial before the Honorable Judge George M. Leighton of the United States Court for the

Northern District of Illinois. On March 17, 1978, the United States filed suit against OMC also in the Northern District. That action is pending before the Honorable Frank McGarr (78 C 1004). On August 10, 1978, the Illinois Attorney General filed its own complaint against OMC.[1]

The Petitioner, OMC, is a Delaware corporation with its executive headquarters in Waukegan, Illinois. (R2, Item 1, par. 5)[2]. It is alleged by both the United States and the Illinois Attorney General that during the years 1959 through 1972 OMC purchased a hydraulic fluid composed of polychlorinated biphenyls ("PCBs"), which fluids were used in an aluminum die cast facility. (R1, Item 1, para. 10; R2, Item 1, para 5). OMC's corporate offices are adjacent to this former facility. It is further alleged that OMC discharged PCBs into a ditch on OMC's property (alleged to be a navigable waterway), into Waukegan Harbor and Lake Michigan. (R1, Item 1, para. 414; R2, Item 1, para. 7). Although there have never been effluent standards governing the discharge of PCBs from an aluminum die casting facility, both the Illinois Attorney General and the United States brought suit against OMC in federal district court seeking

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[1] In addition, an administrative proceeding before the Illinois Pollution Control Board involves a potential determination as to whether OMC must take additional steps to control its discharges. (*OMC* v. *IEPA*, PCB 79-141). That proceeding is also continuing.

[2] These statements are taken from the complaints filed by the United States and the Illinois Attorney General, and from the records filed in the two appeals to the Seventh Circuit (Nos. 79-134 and 79-1725). As used herein, "R1", refers to the record in the first case [the Attorney General's independent claim] and "R2" to record items (from the 79-1725 case) [denial of intervention]

to require OMC to study techniques of removal and undertake the removal of sediments allegedly contaminated with PCBs. (R1, Item 1, pp. 13-14; R2 Item 1, pp. 6-7). These suits claim that OMC was prohibited from ever discharging PCBs. (R1, Item 1, para. 23, R2, Item 1, para. 12, 18)

The opinion of the Court of Appeals below decided two consolidated appeals by the Illinois Attorney General. The first appeal arose from the dismissal of the Attorney General's independent complaint. Two federal causes of action were claimed: one for violation of the Clean Water Act and the second under the federal common law of nuisance. The claims, however, alleged that the discharge had resulted in damage to Illinois' aquatic life, bird life and water quality, as well as harm to the health and welfare of the citizens of Illinois. No other state has sought to sue OMC for any injury to its interests. The dispute is between an elected official of the State of Illinois and an Illinois industry for allegedly injuring interests of Illinois citizens.

The district court dismissed the Attorney General's complaint; finding first, that he had not given the 60 day notice required by the Clean Water Act. 33 U.S.C. §1365(b)(1)(A). That finding was not appealed by the Attorney General. The district court also found that the complaint failed to state a cause of action for federal common law nuisance, because the allegations involved an intra-state controversy between the Illinois residents alleging injury in Illinois, rather than an injury which effected interests of more than one state. (App. D-4). Because there were no proper federal claims the district court dismissed the allegedly pendent state claims. (App. D-4)

After dismissal of the complaint, the Attorney General moved to intervene in the lawsuit which had been filed by the United States against the petitioner. That proposed complaint in intervention alleged the same facts as had the Attorney General's first, independent complaint. (R2, Item 60) It also requested that petitioner be required to undertake a study of techniques of removal and removal of allegedly contaminated sediments underlying navigable waters. *Id.* The district court denied the State's petition to intervene holding that the United States' suit was not an action "to require compliance" with a "standard, limitation or order," and hence the state did not have the right to intervene under Section 505(b)(1)(B) of the Act. (App. C-4) It also found that the interests of the Illinois Attorney General were adequately represented by the United States and also refused to grant permissive intervention. (App. C-5)

In its opinion below, the Court of Appeals reversed the district court in both appeals. It held first that the State's complaint, by merely alleging pollution of navigable waters, was sufficient to state a cause of action under federal common law of nuisance. Moreover, the court held that the federal common law of nuisance "fills the interstices of the [Federal Water Pollution Control] Act" (App. A-7), and stated that the amendments to the Act and regulations issued thereunder do not preempt the federal common law of nuisance. (citing its prior decision in *Illinois* v. *Milwaukee,* 599 F.2d 151, 162-63 (7th Cir. 1979), *cert. granted,* 48 U.S.L.W. 3594 (March 18, 1980), (App. A-7)

In the second appeal, the Court of Appeals held that the state Attorney General was entitled to intervene in the United States' case as a matter of right. Although

the court recognized that the United States was concerned with past pollution, rather than present discharges, the court held, as a matter of policy, that "parties that are affected . . . *should* have a right to intervene. . . ." (App. A-19) (emphasis supplied).

REASONS FOR GRANTING THE WRIT

This case raises issues involving an extraordinarily important and timely question—can the lower federal courts create substantive environmental standards and allow citizens to bypass remedies provided by federal statutes? These issues go to the heart of our system of federal government and the relationship between Congress and the lower federal courts.

The first issue is whether, in view of the comprehensive 1972 and 1977 amendments to the FWPCA and regulations promulgated thereunder, the federal common law nuisance doctrine has been displaced. The second issue considers whether, if nuisance has not been preempted, it applies where there is no dispute between two or more states. The opinion of the Seventh Circuit holding that no interstate effect is necessary is in an acknowledged, direct conflict with decisions of other circuits. The final issues require this Court's review of the scope of the right of intervention by citizens in enforcement actions under the Clean Water Act.

The proper role of the lower federal courts is central to each of these issues and this petition for certiorari. May a federal court depart from Congressional statutes and constitutional authority to reach a "result" which, it believes, "should" be the law, or a result based only on policy? We think not. The function of the federal

courts ought to be to enforce Congress' detailed statutory schemes, such as the Clean Water Act, and to refrain from creation of judge-made substantive standards of conduct. This Court should grant this writ to review the Court of Appeals, and reverse the judgment below and affirm the district court on these issues.

I. THE FEDERAL COMMON LAW OF NUISANCE HAS BEEN DISPLACED BY ENACTMENT OF THE CLEAN WATER ACT.

In April, 1972, this Court announced that a federal common law of nuisance claim could be brought under 28 U.S.C. §1331 for the Illinois Attorney General against the City of Milwaukee, Wisconsin and associated sewage commissions for discharges from the Milwaukee sewers and treatment facilities into Lake Michigan which allegedly injured Illinois' interests. *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972). Prior to that decision, only one federal case had recognized a federal common law nuisance claim. *Texas* v. *Pankey,* 441 F.2d 236 (10th Cir. 1971). Like *Illinois* v. *Milwaukee, Texas* v. *Pankey* involved a claim by one state against pollution originating outside its territory. But since April, 1972, Congress has enacted comprehensive amendments to the Federal Water Pollution Control Act and made "mid-course corrections" to those Amendments by the Clean Water Act of 1977. Despite these extensive amendments, the lower federal courts have continued to accept claims based on the federal common law of nuisance. The Seventh Circuit has now "interpreted" *Illinois* v. *Milwaukee* to allow for a federal claim, regardless of the parties, for any alleged "nuisances" of any waterway subject to federal constitutional authority. (App. A-7)

A. The Clean Water Act Represents A Comprehensive Approach To Restore And Maintain The Quality Of The Waters Of The United States.

General Requirements

Six months after this court's decision in *Illinois* v. *Milwaukee,* Congress abolished the prior Federal Water Pollution Control Act and enacted the Federal Water Pollution Control Act Amendments of 1972. Now known as the Clean Water Act, the statute's objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters. . . ." 33 U.S.C. §1251(a). To accomplish this goal, Congress addressed every substantive issue known to be relevant and created a detailed, direct and logical progression for the nation's efforts to improve the quality of interstate and navigable waters.

The Act provides for the adoption of water quality standards by states, and their review by U.S. EPA. 33 U.S.C. §1313(a). The states were directed to periodically review these standards. *Id.* §1313(c) (1). If the state wishes to change a water quality standard, these revisions must be submitted to U.S.EPA. These revised standards must "be such as to protect the public health or welfare, enhance the quality of water and serve the purpose of this chapter." *Id.* §1313(c) (2). If the standards are inadequate, U.S.EPA is directed to adopt proper standards.

Technology Based Effluent Limitations

A very important feature of the Act is the creation of broad-ranging requirements to be applied at the point of discharge. The first step in this process is the promulgation of effluent limitations. U.S.EPA was directed to adopt regulations, on a category by category basis of wastewater treatment comparable to "best practicable

treatment technology currently available." ("BPT"). *See DuPont* v. *Train*, 430 U.S. 112 (1977). These BPT requirements for all sources were to be achieved by July 1, 1977. 33 U.S.C. §1311(b) (1). Effluent limitations reflecting the "best available treatment technology economically achievable" ("BAT") were originally required to be achieved by July 1, 1983; that step has now been divided into separate BAT requirements and timetables for toxic pollutants and non-toxic, conventional pollutants and a new standard of treatment for "conventional" pollutants from certain sources. 33 U.S.C. §1311(b) (2). Toxic pollutant effluent limitations (and standards where the limitations are insufficient) are mandated under section 307(a). Standards for new sources and for plants which discharge to publicly-owned treatment works are also required. 33 U.S.C. §§1316; 1317(b) (c).

These technology-based effluent limitations must be based upon the technical feasibility and economic reasonableness of applying water pollution control technology and manufacturing techniques to various types of sources. U.S.EPA develops these requirements pursuant to rulemaking and makes extensive use of outside consultants to identify the best techniques available. The affected sources have the opportunity to point out the limits of the recommended techniques and the efforts of the regulations. And pursuant to executive order of the President, U.S.EPA makes determination as to the economic impact and other implications of the proposed regulations.

Source-Specific Requirements and Enforcement

Another major feature of the Act is the National Pollutant Discharge Elimination System ("NPDES") permit program. This system provides a mechanism to transform federal and state requirements for water pollution

control into individualized requirements for each point source. *EPA* v. *California,* 426 U.S. 200, 205 (1976). No point source is exempt from this permit requirement. *National Resources Defense Council* v. *Costle,* 568 F.2d 1369 (D.C. Cir. 1978). The Act also provides for permitting of dredge and fill activities in protected wetlands. 33 U.S.C. §1344.

The Act provides for broad citizens' participation in the setting of these administrative standards, permit conditions and other requirements. 33 U.S.C. §1251(e). U.S.-EPA has historically permitted broad citizen input into its rule-making and permitting procedures. By statute, NPDES permits can be issued by U.S.EPA or by a state, only after a reasonable "opportunity for public hearing." 33 U.S.C. §1342(a) (1),(b) (3); *Costle* v. *Pacific Legal Foundation,* ..... U.S. ....., 100 S. Ct. 1095 (1980). Citizens who have participated in these proceedings may appeal the final administrative decision. *E.g., Porter County Chapter, Izaak Walton League* v. *Costle,* 571 F.2d 359 (7th Cir. 1978).

Although the Act provides for broad citizen participation it clearly and unequivocally limits the citizen (and industrial) advocates to their adminstrative remedies. A decision by U.S.EPA to issue or deny an NPDES permit is reviewable under Section 509(b) (1). 33 U.S.C. §1369(b) (1). Because it is immediately reviewable, any issues which could have been raised in such an appeal may not be litigated in an enforcement proceeding. *Id.* §1369(b) (2). Section 402(k) further provides that, with but one exception, compliance with the terms of a permit shall be deemed compliance, in an enforcement proceeding brought by U.S.EPA or by a citizen, with the operative discharge related requirements of the Act. 33

U.S.C. §1342(k). Indeed, the legislative history of Section 505 discloses that Congress did not intend to allow citizens to sue in federal court to secure "common law definitions of acceptable water quality," which was to take place in the administrative process. S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971); 2 Legis. Hist. at 1497.[3] The intended purpose of the NPDES permit then is to provide a measure of protection for the discharger. *DuPont* v. *Train, supra,* 430 U.S. at 138 n. 28, and to provide for certainty and finality for each discharger's obligations under the Act. *See, EPA* v. *California, supra,* 426 U.S. at 205. This finality also facilitates enforcement.

A final permit may be enforced by U.S.EPA and by citizens directly. A "citizen" under §505 includes a state official such as the Illinois Attorney General. *See,* 33 U.S.C. §1365(g), (h). Thus, Congress has addressed the very deficiency in the previous Federal Water Pollution Control Act which this Court cited in *Illinois* v. *Milwaukee,* 406 U.S. at 103.

Other Issues Addressed By Congress

In addition to the detailed program to control point sources, Congress addressed several other issues concerning protection of water resources.

An entire title of the Act is devoted to the procedure for making available federal assistance for the construction or upgrading of publicly-owned treatment works. 33 U.S.C. §§1281-1289. Section 311 is a self-contained and exhaustive statute specifying the duties and responsibilities (and limits upon those liabilities) for spills of oil and hazardous substances as identified by U.S.EPA. 33

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[3] All citations to "Legis. Hist." refer to "A History of the Federal Water Pollution Control Act Amendments of 1972" (Committee Print, 1973).

U.S.C. §1321. Congress has mandated the state undertake a planning process to control point sources and non-point sources of pollution, and has authorized funds for these efforts. 33 U.S.C. §1288(b), 1313(e). A program for the restoration of publicly-owned, fresh water lakes was also created and recently expanded. 33 U.S.C. §1324.

Other provisions of the Clean Water Act address the transition from the prior statute and Refuse Act, to the present comprehensive program. The 1972 Amendments essentially terminated the Refuse Act as a basis for federal control of discharges.[4] *EPA* v. *California,* 426 U.S. at 204. Permits issued under the Refuse act were deemed permits issued under the 1972 Amendments. 33 U.S.C. §1342(a) (4). Any person who had applied for a Refuse Act permit and whose application for a permit was still pending when the 1972 Amendments were adopted, was protected from suit for not having a permit until December 31, 1974 or until the permit was issued or the request denied. 33 U.S.C. §1342(k).

The statute also addresses pollutants that had already been discharged and other non-point sources. Congress directed that U.S.EPA identify the location of in-place pollutants with particular emphasis on toxic pollutants in critical harbors and to proceed to remove these substances through the Corps of Engineers. 33 U.S.C. §1265. This provision was apparently intended for harbors on the Great Lakes, and to offset the extra costs of dredg-

[4] Of course, the Corps of Engineers did not interpret the Refuse Act so as to require a pollution control program; only in 1971 did the Corps adopt implementing regulations. *See also, Pennsylvania Industrial Chemical Company* (*PICCO*) v. *United States,* 411 U.S. 655, (1973). And within a year, a district court enjoined issuance of these permits. *Kalur* v. *Resor,* 355 F. Supp. 1 (D.D.C. 1971).

ing these materials. 1 Legis. History at 167. EPA was also directed to undertake a clean-up program in Lake Erie, and to enter into contracts for the demonstration of practical methods for removal of pollutants from the Great Lakes. 33 U.S.C. §1258(c), (a).

The Present Decision

The Seventh Circuit has again refused to accept the Clean Water Act as displacing the federal common law of nuisance. (App. A-7, see App. D-3) OMC applied for a Refuse Act permit and was ultimately issued an NPDES permit. The Illinois Attorney General complained that OMC has violated the permit, but he did not appeal the district court's dismissal of that count of his complaint. He has never alleged that the federal statute is inadequate, yet he has succeeded in getting into federal court by abandoning that claim. Petitioner believes that its federal obligations ought to be measured under the Clean Water Act, and its NPDES permit. OMC is entitled to the certainty and finality Congress intended to accord to NPDES permits. The is no basis for the federal courts to override the comprehensive legislative and administrative standards included in and promulgated under the Clean Water Act, and OMC's NPDES permit.

B. The Doctrine Of Separation Of Powers Prohibits The Federal Common Law Of Nuisance Being Applied To Dispute Involving Alleged Pollution Of Interstate Or Navigable Waters.

The constitutional doctrine of separation of powers allocates essential authority among the governmental departments. The effect of the doctrine is to require that each branch respect the distinctive powers of the others. *TVA* v. *Hill*, ... U.S. ....., 98 S. Ct. 2279, 2301 (1978). To meet this requirement, Congress must defer to the judicial

functions of interpretation and review, and the courts must defer to the Congressional function of legislation. This Court has consistently declined to substitute its judgment for that of the Congress, and has refrained from encroaching upon legislative authority where Congress has expressly addressed matters of public policy.

A recent decision of this Court, *TVA* v. *Hill*, ... U.S. ....., 98 S. Ct. 2279 (1978) exemplifies that approach. There the Court refused to impose a judicial remedy, finding that Congress had specifically ordered its priorities in the Endangered Species Act. Basing its deference to the Congressional policy upon the doctrine of separation of powers, the Court stated:

> Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt Congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political Branches.

Id. at 2302. To preserve the structural integrity of the constitutional design, this Court ruled that the judiciary must avoid intruding upon the policy-making activities of the Congress. *Id.*

Where Congress has enacted an applicable statute, the courts may not invoke a parallel judicial remedy. The Court's respect for that principle is illustrated by its decision in *Arizona* v. *California*, 373 U.S. 546 (1963), where the Court was presented with the struggle of the southwestern states to allocate the waters of the Colorado River. Interstate distribution of water had been governed by two common law doctrines, prior appropriation and equitable apportionment. Recognizing the continuing controversy, Congress enacted the Boulder Canyon Proj-

ect Act in 1928 to provide a method of allocating water among the states. However, the displacement of the judicial apportionment doctrines was not acknowledged until 1963, when this Court found that Congress had created a comprehensive water distribution plan in the Boulder Canyon Project Act. *Id.* at 565.

> Where Congress has so exercised its Constitutional power over waters courts have no power to substitute their own notions of "equitable apportionment" for the apportionment chosen by Congress.

Id.

Moreover, even where a judicial doctrine has been formulated for the precise issue presented, this Court has deferred to a Congressional scheme in keeping with the separation of powers doctrine. This Court again refused to substitute its judgment for that of Congress in *Mobil Oil Company* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978). The general maritime law provided no survivor's remedy, the Court had ruled in *The Harrisburg,* 119 U.S. 199 (1886), barring recovery for maritime fatalities unless they occurred in waters within the jurisdiction of the state courts and their wrongful death statutes. In 1920 Congress responded to this apparently capricious denial of survivors' benefits by enacting the Death on the High Seas Act. In 1970, however, the Court repudiated *The Harrisburg* and held that the general maritime law provided a wrongful death remedy when the fatality occurred within state waters. *Moragne* v. *States Marine Lines, Inc.,* 368 U.S. 375 (1970). The Court further expanded that ruling in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), where the location of the fatality was not considered a significant factor. With these two decisions, the Court had created a means of avoiding entirely the Death on the High Seas Act. This Court rectified this confusion in *Mobil Oil Corp.*

v. *Higginbotham*, ... U.S. ....., 98 S.Ct. 2010 (1978), where it deferred to the Death on the High Seas Act and held it constituted the Congressional expression of a wrongful death policy. *Id.* at 2015. With that decision, this Court ruled that a judicial remedy may not be invoked to override a statutory scheme created by Congress.

The present case involves a situation within the scope of the Clean Water Act. Congress has there declared the federal policy and has outlined its mandate to all concerned. The courts have no authority to create additional substantive law.

C. The Federal Common Law Of Nuisance Jeopardizes The Integrity Of The Statutory Scheme.

If a citizen, a state, or even the federal government is now permitted to claim a "nuisance" under the federal common law, the significance of the Congressional program will be substantially eliminated. Citizens will not be required to give prior notice of their suits against dischargers and would be able to secure a judge-made water quality standard. States and citizens will not be forced to first participate in administrative proceedings before going to court. Dischargers will have little incentive in participating in the administrative program. Even federal officials might use the theory to bypass the limitations stated in their enabling authority and the protection given dischargers by sections 402(k) and 509(b)(2).

This will increase the costs of doing business and provide greater incentive towards litigation. Rather than concentrating on achieving compliance with a known effluent requirement, companies and municipalities will be forced to retain legions of lawyers and consultants to defend their operations. Even if the company or city

prevails, the high costs of litigating in court each and every "nuisance", will be paid by someone. These costs must be borne either by the purchasers of the company's product (or the city's sewer services), the taxpayers, the investor who owns or has lent capital to the company or city, the employees or the persons who do business with the discharger, or any combination of these persons. Petitioner does not challenge the clear utility of environmental protection and control. However, OMC submits that there is no basis for the federal courts being a repository of power to duplicate and override the administrative programs created by the Clean Water Act, except when the court is called upon, under the provisions of the Act, to enforce Congressional intent and restrain improper agency action or inaction.

D. Summary - This Court Should Hold That The Clean Water Act Has Displaced The Federal Common Law Of Nuisance.

Congress has declared the federal policy for the protection of navigable waters through the Clean Water Act. The Act has been amended twice in the past decade to incorporate comprehensive detailed and specific approaches to environmental control for discharges from all potential sources of water pollution, including point and non-point sources. To interpose the federal common law of nuisance where the provisions of the Clean Water Act specifically apply to the controversy presented would allow the federal judiciary to override the policy determinations of the Congress. That ruling would directly contravene this Court's contemporary interpretation of the doctrine of separation of powers. *Mobil Oil Corp.* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978); *Arizona* v. *California,* 373 U.S. 546 (1963). Nullification of the NPDES program and a dramatic expansion of

the role of the federal courts would result. Since the federal courts would have voided the certainty and finality accorded to discharges in the Clean Water Act, they would be presented with the myriad issues of discharge control which the Act had allocated to administrative determination. To allow the lower federal courts to apply the federal common law of nuisance is unwise as a matter of judicial policy and constitutes an unconstitutional usurpation of Congressional authority.

II. IF THE FEDERAL COMMON LAW OF NUISANCE HAS NOT BEEN DISPLACED BY THE CLEAN WATER ACT, THEN IT CAN EXIST ONLY TO PROVIDE AN IMPARTIAL FORUM AND RULE OF DECISION FOR CASES INVOLVING AN INTER-STATE DISPUTE.

While we believe this court should hold that the federal common law of nuisance has been displaced, even if it remains viable for some situations, it cannot properly be applied to local disputes.

A. The Decision Below Created A Conflict Among The Circuits. The Circuits Continue To Be Confused In Their Understanding Of The Federal Common Law Of Nuisance.

The Seventh Circuit deliberately created a conflict in its opinion below and refused to follow the decisions of the Fourth and Eighth Circuits.

> With due deference to the courts deciding those cases, we disagree with the rationale they adopted. As we read *Illinois* v. *Milwaukee,* the Supreme Court explicitly recognized a federal common law action to abate pollution in "inter-state or navigable water.

(App. A-13)

The district court had followed those other circuits in holding that the complaint filed by the Illinois Attorney

General against OMC for pollution allegedly originating at its Waukegan, Illinois plants, did not state a cause of action under the federal common law of nuisance. (App. A-13) In reversing the trial judge, the Court of Appeals created a conflict among the circuits and unnecessarily broadened the scope of 28 U.S.C. §1331 to include nuisance claims which presented no inter-state issues.

In *Reserve Mining Co.* v. *EPA,* 514 F.2d 492 (8th Cir. 1975), the Court of Appeals for the Eighth Circuit rejected the federal common law of nuisance as a basis for relief, citing *Illinois* v. *Milwaukee* and *Texas* v. *Pankey.* The Court held that the complaint of the United States alleging that the defendant's discharge significantly endangered the health of persons in the vicinity of the defendant's operations, did not allege inter-state effects and did not have a claim for relief under federal common law of nuisance. In *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1008 (4th Cir. 1976), that court construed *Illinois* v. *Milwaukee* to stand for the proposition that federal common law of nuisance permits the abatement "of a public nuisance in one state which infringes upon the environmental and ecological rights of another state. . . ." The Court refused to apply the federal common law to what it found to be an intra-state matter. The controversy there was found to be entirely local in nature; the parties were local, there were no allegations of any effect outside the State of Maryland, no other state was complaining of the nuisance and the law of Maryland was adequate for the resolution of the dispute.

The Seventh Circuit refused to follow these decisions, stating:

> There is no basis for putting a gloss on the Supreme Court holding that would restrict its application to situations in which one state complains of damages to its environment or ecology by a pollution source in another state.

(App. A.13)

Had the Seventh Circuit followed these decisions, it would have upheld the district court. Like the plaintiffs in *Reserve Mining* and *Jones Falls,* the alleged pollution here involves a dispute between an Illinois official and an Illinois based company concerning alleged operations at an Illinois facility which allegedly injured Illinois interests.

This Court should intercede to resolve this new conflict. Decisions from other circuits indicate they, too, are in need of guidance as to the proper scope of the federal common law of nuisance. The First Circuit has remarked in dicta that "Whether the common law so recognized [in *Illinois* v. *Milwaukee*] extends to suits involving pollution originating within the territorial jurisdiction of the plaintiff is doubtful." *Massachusetts* v. *United States Veterans Administration,* 514 F.2d 119, 123 (1st Cir. 1976). The Third Circuit recently stated, "Relegating these [private] litigants to *possibly* conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to *federalize* those standards and would undermine federal uniformity. These plaintiffs have sufficiently alleged pollution of interstate waters." *National Sea Clammers Association* v. *City of New York,* 616 F.2d 1222, 1233 (1980) (emphasis supplied). The Second Circuit has summarily affirmed a district court decision holding that the federal common law of nuisance should be limited to cases with

multi-state impact or effect. *East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977), *aff'g Parsell* v. *Shell Oil Co.*, 421 F.Supp. 1275 (D. Conn. 1976). That court is now awaiting this court's decision in *Milwaukee* v. *Illinois*, 79-408, before deciding whether a federal common law of nuisance claim may be maintained by residents against a New York utility which had complied with standards approved by the U.S.EPA. *New England Legal Foundation* v. *Costle*, No. 79-6202 (2d Cir. May 20, 1980). This Court should also clarify the permissible scope of the federal common law of nuisance (if it should exist at all) to resolve the dispute among the circuits and provide definitive guidance to the lower federal courts.

B. Federal Common Law Of Nuisance Can Apply Only To Inter-State Disputes.

In addition to creating this conflict, the Seventh Circuit under the federal common law of nuisance has now created an independent basis for substantive, judge-made standards for environmental protection. According to the Seventh Circuit state standards are "highly relevant." (Slip opinion at 10 n. 16; App. A-12). And it is clear that the federal common law of nuisance preempts state law. As this Court stated in *Illinois* v. *Milwaukee*:

> While federal law governs, consideration of state standards may be relevant. Thus a State with high water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor.

406 U.S. at 107 (citations and footnote omitted).

But in the present case, the only "relevant" standards are those promulgated by the State of Illinois. Should the federal court enforce a different standard, either more or less stringent? For the federal court to adopt and enforce a different standard would create an independent judicial override on state standards. Such a "brooding omnipresence" in the federal judiciary has long been discredited. *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945). If the common law standard were more stringent than Illinois, it would constitute judicial legislation of state interests. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). But if the federal standard would not be more stringent, then nuisance could not be a substantive federal question and be no basis for federal jurisdiction. *Gully* v. *First National Bank,* 299 U.S. 109 (1936).

The federal common law of nuisance should exist, if at all, only to provide an impartial forum and rule of decision for inter-state disputes. Each of the cases cited by this Court in *Illinois* v. *Milwaukee* involved disputes based upon conflicting interests of two or more states. The federal courts interceded to resolve a classic federalism controversy. The named parties need not be sovereign states; but the parties' adverse interests must be based upon the laws and interests of more than one state. *See, Illinois* v. *Milwaukee,* 406 U.S. at 105 n. 6.

It is not enough that the waters be interstate. Leases to federal lands and a federal interest in safe aircraft travel do not create a basis for a federal common law, absent a "showing that state law is not adequate. . . ." *Wallis* v. *Pan-American Petroleum Corp.,* 384 U.S. 63, 71 (1966); *Miree* v. *DeKalb County,* 433 U.S. 25, 32

(1977). The decision to displace state law should be left to Congress, at least where there is no showing of an actual conflict between the laws of two or more states, or between the laws of a state and a federal policy. *Miree* v. *DeKalb County, supra*; *see Illinois* v. *Milwaukee*, 406 U.S. at 107 n.9.

The purpose then of the federal common law of nuisance, if it is to have any purpose at all, is to provide a rule of decision in a federal forum. Because all the significant contacts pleaded in this case involve Illinois law, there is no "inter-state effect" and no permissible basis for invoking federal jurisdiction under the federal common law of nuisance and 28 U.S.C. §1331.

C. The Opinion Below Unnecessarily And Improperly Broadens The Jurisdiction Of Federal Courts Over Nuisance Claims.

The opinion states that any "pollution" of water within the commerce power of Congress gives rise to a federal common law of nuisance claim. Neighbor may now sue neighbor in federal court simply by claiming a "nuisance". The state courts and administrative bodies can be bypassed simply by claiming sufficient damage. Because birds fly (just as "Fish swim" [App. A-17]) and this Court's decision in *Illinois* v. *Milwaukee* spoke in terms of *air and water*, even localized air "pollution" nuisance claims would be federal questions under the Seventh Circuit's decision below. An untended backyard grill, if it allegedly caused sufficient injury to a neighbor's property, could be the basis for suit in federal court under nuisance. Unless reversed, the precedent established by the decision below would turn federal courts into a par-

allel forum for adjudication of cases heretofore decided only by state courts.

The Seventh Circuit's ruling is an unwarranted intrusion of the federal courts into matters which are purely local in nature, where state forums are available to settle the disputes and where state law could be applied. Moreover, the involvement of federal courts in all disputes involving navigable or inter-state waters will circumvent the intent of Congress that states should play an important role in pollution control. 33 U.S.C. §1251(b). The application of a federal common law would preempt the state's own pollution control laws concerning alleged pollution of waters and alleged harm within the state. *Illinois* v. *Milwaukee,* 406 U.S. at 103 n.5. But Congress intended to preserve state authority. 33 U.S.C. §1370.

The decision below would also permit citizens to bypass the restraints of Section 505(b) of the Clean Water Act. 33 U.S.C. §1365(b). This will undermine the incentive for citizens to use their extensive administrative opportunities *before* going to court. It will conflict with Congress' intent that citizens not resort to the courts for creation of common law water quality standards. 2 Legis. History at 1497.

The holding of the court below that all air and navigable water pollution cases involve a federal question is clearly erroneous and goes far beyond this Court's decision in *Illinois* v. *Milwaukee.* This matter of extreme and timely importance should be resolved by this Court in reversing the decision of the Court of Appeals.

III. THERE IS NO STATUTORY RIGHT OF INTERVENTION TO THE PENDING SUIT BECAUSE THAT ACTION IS NOT ONE SEEKING TO REQUIRE COMPLIANCE WITH A "STANDARD, LIMITATION OR ORDER".

This Court should also review the Court of Appeals' careless application of the statute to the case before it and the unlimited intervention allowed by the Court's gloss upon section 505(b)(1)(B). Further, the Court of Appeals decided this question based upon a legislative-type judgment which ignores the careful language of the section. Moreover, the court effectively entered an advisory opinion.

After his complaint against OMC was dismissed and he had filed a notice of appeal in the Court of Appeals, the Attorney General then filed a Motion for Leave to Intervene in the case brought by the U.S.EPA. This U.S.EPA case was filed in March, 1978 (five months *before* the Attorney General's claim was filed) and had then been pending before Judge McGarr for a year. The district judge had had the opportunity to meet with counsel for the United States and OMC and rule on various interlocutory and discovery matters. He had been apprised of the nature of that case by the parties. After considering briefs by the parties, Judge McGarr denied the Motion to Intervene. The Attorney General appealed.

The Attorney General's independent complaint, which included an allegation that OMC had violated its NPDES permit, was dismissed in part, for failure to give the requisite 60 days notice under Section 505(b)-(1)(A). The Attorney General did not appeal that ruling. (App. A) Yet the Court of Appeals apparently believed that, notwithstanding this tactical decision, it should get

the Attorney General into the pending litigation, regardless of the limitations stated in the Clean Water Act. The Court of Appeals committed serious error in allowing the Illinois Attorney General to bypass the remedy created by Congress.

The right to intervene depends upon (1) the federal government having brought suit (2) "to require compliance with the standard, limitation or order" which the citizen has alleged is being violated by the discharger. A "standard, limitation or order" is specifically defined for purposes of Section 505 as pertaining to *discharges* of pollutants from point sources. 33 U.S.C. §1365(f). The typical example of a discharge from a point source is an outfall from a manufacturing facility. *DuPont* v. *Train,* 430 U.S. 112, 114-15 (1977).

The relief specifically requested by the federal government does not include a request that OMC further control eixsting discharges; rather it seeks the removal of alleged in-place pollutants, (which allegedly had resulted from previous discharges by OMC) and the imposition of penalties. After having met on numerous occasions with counsel for U.S.EPA and OMC, Judge McGarr ruled that the remedy sought was not one seeking to require compliance with a discharge requirement. (App. C-4)

> ". . . The government obviously elected to seek relief only for past violations. . . .
> Had Congress intended to grant intervention as of right in all suits brought by the Administrator under the Act, it could have so worded §505(b)(1)(B)."

Id. The Court of Appeals "[a]dmitted [that] the federal government seeks only an injunction to require dredging. . . ." (App. A-19) But the Court of Appeals then stated:

> "The complaint, however, states that the injunctions sought are designed to prevent further contamination of the bodies of water, and it leaves open the door for the court to grant such other and further relief as it deems just and proper."

The court erroneously stated that OMC was discharging a dangerous amount of PCBs[5] and then opined ". . . parties that are affected by this pollution *should have a right to intervene to seek abatement* even if the federal government is principally concerned with past pollution." *Id.* (emphasis supplied). But Congress *did not* prohibit separate citizen's actions to require compliance. As pointed out by Judge McGarr, Congress could have written the Act to allow intervention in all cases (in which case it would likely have prohibited separate citizen actions). Courts, however, have no power to rewrite a statute so as to allow that which they believe "should" be the law. *E.g., Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1977).

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[5] The complaints alleged that OMC is still discharging PCB's. The record shows, however, that OMC, IEPA and U.S.EPA agreed on a plan by which OMC would reduce its discharges and that OMC has implemented this plan. (R2, Item 10, Exhibits 6,7; R2, Item 16). In fact, OMC has no process water outfalls — its outfalls discharged only noncontact cooling water and stormwater runoff. (R2, Item 27, para. 6). The only "danger" even alleged by the government is that certain sediments may release PCBs and affect water quality. (R2, Item 1, pp. 6-7). The only "discharge" of PCBs apparently stems from OMC's intake water (which is used as non-contact cooling water) and the presence of PCBs in rainfall over Lake Michigan. *E.g.,* Murphy, T.J. and Rzeszutks, C.P., *Precipitation Inputs Of PCBs To Lake Michigan,* J. Great Lakes Res. (Dec. 1977).

Indeed, the legislative history of the Clean Water Act clearly shows that Congress did not intend for "citizens" to be participants, under Section 505, in cases such as the pending case filed by the United States. The pending case alleges an adverse affect upon water quality, but specifies no promulgated water quality standards which must be enforced. The prayer leaves it to the district court to decide ultimately what is an appropriate water quality standard: should the sediments be removed, and if so, how much and in what manner? But Congress made clear that Section 505 would not be the basis for citizen's resort to federal courts to establish acceptable water quality levels. According to the Senate committee which initially drafted the bill, "Section 505 will not substitute a 'common law' or court developed definition of water quality." 2 Legis. History at 1706. The Court of Appeals has done just what Congress feared — allowed the Attorney General or any other "citizen", to attempt to persuade Judge McGarr as to what the ultimate remedy should be.

The Court of Appeals erroneously relied on the standard, boilerplate prayer for relief ("Such other relief as the Court may deem just") as "leaving the door open" for Judge McGarr to order further abatement of OMC's alleged discharge. (App. A-19) If that remains the law, then citizens may intervene in any government case under the Clean Water Act. We believe the wiser course was that chosen by Judge McGarr — that this general prayer for relief was not sufficiently specific as to trigger a right to intervene under §505(b)(1)(B). (App. C-4) This court should accept this writ to uphold Judge McGarr's common sense interpretation of this general boilerplate phrase.

Intervention into the pending case should have been decided on the intervention rules established by this Court. F.R. Civ. P. 24(a)(2) and (b)(2). The indiscriminate holding of the Court of Appeals was not required by Congress and unnecessarily broadens citizens access to the federal courts; indeed, it would permit citizens to sue to create new water quality standards. The Court of Appeals issued what was essentially an advisory opinion — it allowed the Attorney General to bring a claim against OMC in federal court, even though he had abandoned the dismissal of his §505(a) claim on appeal. Congress has already specified the conditions under which an independent action could be brought by enacting Section 505(b)(1). The court below was powerless to expand the scope of the statute. *Cf. Costle* v. *Pacific Legal Foundation,* ..... U.S. ....., 100 S.Ct. 1095 (1980).

For these reasons, this Court should set aside the decision of the Seventh Circuit that there is a right for citizens to intervene in the pending federal case.

IV. THE COURT OF APPEALS COMMITTED SERIOUS ERROR ALLOWING THE INTERVENOR TO CHOOSE BETWEEN MAINTAINING A SEPARATE SUIT OR INTERVENING IN THE PENDING CASE BROUGHT BY THE UNITED STATES.

The Court of Appeals held that the Attorney General was entitled to intervene as of right pursuant to §505(b)(1)(B).[6] It also stated that the Attorney General had a choice of maintaining a separate common law of nuisance action, or intervening. (App. A-20). This in-

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[6] The Court of Appeals' concept of "pollution" is inconsistent with the detailed rules laid out in the Clean Water Act. *E.g., DuPont* v. *Train,* 430 U.S. 112 (1977).

credible disregard of the Congressional scheme must be reviewed by this Court to preserve respect for the limitation on citizen participation stated in the Act. *Cf. Costle* v. *Pacific Legal Foundation,* ..... U.S. ....., 100 S.Ct. 1095 (1980) (construing the limitations contained in section 402(a) of the Act, for requesting adjudicatory hearings on NPDES permits).

The statute prohibits the courts and citizens from electing to sue independently or intervening as of right under §505. Independent citizen suits are prohibited by Section 505(b)(1)(B) when federal or state government is already "diligently prosecuting an action to require compliance with the standard, limitation or order," cited by the citizen as being violated. 33 U.S.C. §1265(b)(1)(B); *E.g., Stream Pollution Control Board* v. *United States Steel Corp.,* 512 F.2d 1036 (7th Cir. 1975) (Stevens, J.). But citizens may intervene "in such actions," as a matter of right. Citizen intervention under the act thus exists only when a separate citizen action is prohibited.

Section 505(b)(1)(B) focuses on the remedy being sought by the state or federal government. Neither the intervenor nor the court have authority to elect to sue separately or intervene. Indeed, the statutory provision is consistent with the rule that an intervenor takes the case as he finds it. *Fuller* v. *Volk,* 351 F.2d 323, 328 (3rd Cir. 1965).

If Section 505(b)(1)(B) applies to the pending case, the court is powerless to allow a separate proceeding to continue. If there is no prohibition against a separate citizen suit, then there is no right to intervene. The judgment of the Court of Appeals allowing the Attorney

General his choice of action should be set aside. It is a gross departure from the statute which this Court should correct.

CONCLUSION

For the foregoing reasons, Petitioner submits that the Court should issue the Writ of Certiorari and review the instant decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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No. 80-126

In the

Supreme Court of the United States

OCTOBER TERM, 1980

OUTBOARD MARINE CORPORATION,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
(by William J. Scott, Attorney General)

UNITED STATES OF AMERICA,

and

MONSANTO COMPANY,

Respondents.

Appendices to the Petition for a Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

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Appendices to the Petition for a Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-1341

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

vs.

OUTBOARD MARINE CORPORATION, INC., a Delaware corporation,
Defendant-Appellee.

No. 79-1725

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OUTBOARD MARINE CORPORATION,
Defendant and Third Party Plaintiff-Appellee, and

MONSANTO COMPANY,
Third Party Defendant.

Appeal Of: PEOPLE OF THE STATE OF ILLINOIS,
Proposed Intervenor.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 78 C 3187 & 78 C 1004
FRANK J. MCGARR, *Judge.*

ARGUED NOVEMBER 26, 1979—DECIDED MARCH 28, 1980

Before SWYGERT, *Circuit Judge*, WISDOM, *Senior Circuit Judge*,* and TONE, *Circuit Judge*.

WISDOM, *Senior Circuit Judge*. The first of these two consolidated appeals involves a question of federal common law: Does a state have a federal common law cause of action for nuisance against an in-state pollution source? We hold that it does have such a cause of action to prevent pollution of interstate or navigable waters. The second appeal concerns an attempt by the State to intervene in a suit by the federal government against the offending company. We hold that in the interest of the people of Illinois the State has the right to intervene in the federal suit.

On August 10, 1978, the Attorney General of the State of Illinois brought this action on behalf of the People of Illinois in federal district court against Outboard Marine Corporation (OMC), alleging that at least since January 1, 1959, OMC had discharged highly toxic polychlorinated biphenyls (PCBs)[1] from its Waukegan, Illinois manufacturing facility[2] into the North Ditch (a tributary of Lake Michigan), Waukegan Harbor, and Lake Michigan. The State alleged that the PCBs had accumulated in the bottom sediments of the receiving waters, causing contamination at levels that damaged aquatic life, bird life, and water quality, threatened the health and welfare of residents of Illinois, and impaired

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

[1] PCBs are highly toxic chemical mixtures that are heat and flame resistant. The complaint alleged that hydraulic fluids used by OMC from 1959 until 1972 contained the PCBs, and that these fluids were still draining into the receiving waters through OMC's waste-water collection and disposal system.

[2] The facility is located approximately 10 miles south of the Wisconsin border. It manufacturers outboard motors and their component parts.

the usefulness of the Lake as a public water supply and place of recreation.[3] The State sued under the federal common law of nuisance and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.* For good measure, the State added several pendent claims based on Illinois law.[4] The complaint asked for an injunction restraining OMC from further discharging PCBs from OMC's Waukegan facility; a mandatory injunction directing OMC to study removal and disposal methods for the accumulated PCB-contaminated sediments; a mandatory injunction directing OMC to remove and dispose of the PCB-contaminated sediments in the North Ditch, Waukegan Harbor, and Lake Michigan; and a similar injunction requiring removal of PCB-contaminated soil. The complaint also asked for civil penalties.

On October 2, 1978, OMC filed a motion to dismiss the complaint. The court granted the motion on February 2, 1979. The district judge recognized that "there is indeed federal jurisdiction over a claim based on the federal common law of nuisance". Taking an unnecessarily narrow view of *Illinois* v. *Milwaukee,* 1972, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712, however, the court held that the federal common law count failed to state a claim upon which relief could be granted because this case "involves a controversy between two Illinois residents". There was "no allegations of injury to or from another state". The court ruled that it had no jurisdiction over the FWPCA claim because Illinois had not given the required 60 days notice to the Administrator or to the defendant. The State did not appeal this ruling.

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[3] The complaint alleged that in some portions of Waukegan Harbor and its tributaries PCBs currently comprise as much as 25 percent of the bottom sediments.

[4] The state law counts are based on the Illinois Public Nuisance Act, the Illinois Environmental Protection Act, the Illinois common law of nuisance, and the Illinois common law of trespass.

Finally, because the federal claims had been dismissed, the court rejected pendent jurisdiction.

Meanwhile, on March 17, 1978, the United States filed a complaint in federal district court against OMC, also alleging PCB-contaminated discharges into the three bodies of water. The action was brought under the Refuse Act, 33 U.S.C. § 407, the FWPCA, and the federal common law of nuisance. The court was asked to enjoin further contamination by requiring OMC to dredge and safely dispose of the PCB-contaminated sediments and to pay civil penalties. This suit was assigned to the district judge who was handling the other suit.[5]

On March 23, 1979, the Attorney General of Illinois filed a motion for leave to intervene in the federal suit, giving three reasons for intervention. (1) The State had a statutory right to intervene under § 505(b)(1)(B) of the Clean Water Act of 1977, 33 U.S.C. § 1365(b)(1)(B). *See* Fed.R.Civ.P. 24(a)(1). (2) It had the right to intervene because of its special interest in the litigation and the inability of the United States to represent adequately that interest. *See* Fed.R.Civ.P. 24(a)(2). (3) The State should be permitted to intervene because its claim had questions of law and fact in common with the federal government's contentions. *See* Fed.R.Civ.P. 24(b). On May 29, 1979, the district judge denied the motion for leave to intervene.[6]

The Attorney General appeals in both suits. The United States filed an amicus brief in favor of the intervention.

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[5] On October 10, 1978, the district judge ordered the two cases consolidated for discovery. On November 16, 1978, OMC filed a third party complaint against Monsanto, the company manufacturing the hydraulic fluids for OMC.

[6] Although the United States did not oppose Illinois's intervention, OMC did. Interestingly, at one time OMC contended that the federal suit should be dismissed because it did not join a necessary party, the State of Illinois.

I.

Erie R.R. Co. v. *Tompkins,* 1938, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, held that there is no *general* federal common law. The same day the Supreme Court decided *Erie* it laid the groundwork for a "specialized common law".[7] *See Hinderlinder* v. *La Plata River & Cherry Creek Ditch Co.,* 1938, 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202. Since that time courts have fashioned federal common law "when there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism". *Illinois* v. *Milwaukee,* (1972), 406 U.S. 91, 105 n.6, 92 S.Ct. 1385, 31 L.Ed.2d 712. The doctrine has been applied to areas of the law as diverse as obligations by or to the

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[7] The term "specialized common law" was coined by Judge Henry Friendly in his classic article on *Erie* and federal common law. Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U.L. Rev. 383, 405 (1964). For other general discussions of federal common law, see P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 756-832 (2d ed. 1973); C. Wright, *Law of Federal Courts* § 60 (3d ed. 1976); Hill, *The Law-Making Power of the Federal Courts: Constitutional Pre-emption,* 67 Colum. L. Rev. 1024 (1967); Mishkin, *The Variousness of "Federal Law"; Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. Pa. L. Rev. 797 (1957); Monaghan, *The Supreme Court, 1974 Term—Foreward: Constitutional Common Law,* 89 Harv. L. Rev. 1 (1975); Panel Discussion, *The Future of a Federal Common Law,* 17 Ala. L. Rev. 10 (1964); Note, *The Federal Common Law,* 82 Harv. L. Rev. 1512 (1969); Note, *Rules of Decision in Nondiversity Suits,* 69 Yale L.J. 1428 (1960); Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie,* 74 Yale L.J. 325 (1964); Comment, *The Invalid Growth of the New Federal Common Law Dictates the Need for a Second Erie,* 9 Hous. L. Rev. 329 (1971).

United States,[8] suits on labor contracts affecting commerce,[9] unfair competition in or affecting interstate commerce,[10] and regulation of the activities of interstate carriers.[11] In 1972 the Court formulated a federal common law of nuisance.[12] *Illinois* v. *Milwaukee,* 406 U.S.

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[8] *See, e.g., Priebe & Sons, Inc.* v. *United States,* 1947, 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed. 32; *United States* v. *County of Allegheny,* 1944, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209; *Clearfield Trust Co.* v. *United States,* 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838. *See generally* Friendly, *supra* note 7, at 408-11.

[9] *See, e.g., Textile Workers* v. *Lincoln Mills,* 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972.

[10] *See, e.g., Huber Banking Co.* v. *Stroehmann Bros. Co.,* 2 Cir. 1958, 252 F.2d 945, 952-53, *cert. denied,* 1958, 358 U.S. 829, 79 S.Ct. 50, 3 L.Ed.2d 69; *Dad's Root Beer Co.* v. *Doc's Beverages, Inc.,* 2 Cir. 1951, 193 F.2d 77; *Stauffer* v. *Exley,* 9 Cir. 1950, 184 F.2d 962.

[11] *See, e.g., Francis* v. *Southern Pacific Co.,* 1948, 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798.

[12] In the sequel to the Supreme Court's *Illinois* v. *Milwaukee* case this Court stated the elements of such a claim: "The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant." *Illinois* v. *Milwaukee,* 7 Cir. 1979, 599 F.2d 151, 165.

For a discussion of the federal common law of nuisance, see Campbell, *Illinois* v. *City of Milwaukee: Federal Question Jurisdiction Through Federal Common Law,* 3 Envt'l Law 267 (1973); *Fourth Circuit Review—Federal Common Law for Water Pollution Nuisance Abatement Confined to Interstate Controversies,* 34 Wash. & Lee L. Rev. 590 (1977); Note, 26 Emory L.J. 433 (1977): Note, *Federal Common Law Remedies for the Abatement of Water Pollution,* 5 Fordham Urb. L.J. 549 (1977); Note, *Federal Common Law and Interstate Pollution,* 85 Harv. L. Rev. 1439 (1972); Note, 50 Tex. L. Rev. 183 (1971);

91. The decision in the instant case turns on the broad policy considerations expressed in *Illinois* v. *Milwaukee.*

The nation has a basic overriding federal interest in interstate and navigable waters and in developing a uniform program of protecting these national resources from pollution. The Federal Water Pollution Control Act made this interest explicit. The federal common law of nuisance fills the interstices in the Act.[13]

There is nothing in the Supreme Court's reasoning in *Illinois* v. *Milwaukee* to indicate that it attached any weight to the fact that the pollution came from an out-of-state source. The Court declined to take original jurisdiction but held that the district court had jurisdiction because, under 28 U.S.C. § 1331, the case was one that "arises under the Constitution, laws, or treaties of the United States". The Court phrased the question:

> The question is whether pollution of interstate or navigable waters creates actions arising under the "laws" of the United States within the meaning of § 1331(a). We hold that it does; and we also hold that § 1331(a) includes suits brought by a State.

406 U.S. at 99. "Section 1331 jurisdiction will support claims founded on federal common laws as well as those of a statutory origin." *Id.* at 100. Writing for a un-

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[13] (Continued)
Note, 13 Wake Forest L. Rev. 246 (1977); Note, 1972 Wis. L. Rev. 597; Comment, 49 Denver L.J. 609 (1973); Comment, 77 Dick. L. Rev. 451 (1972); Comment, *The Expansion of Federal Common Law and Federal Question Jurisdiction to Interstate Pollution,* 10 Hous. L. Rev. 121 (1972); Comment, 7 Suffolk L. Rev. 790 (1973); Comment, 1977 Wash. U. L.Q. 164.

[18] In the sequel to the Supreme Court's *Illinois* v. *Milwaukee* case this Court held that the 1972 and 1977 amendments to the FWPCA do not preempt the federal common law of nuisance. *Illinois* v. *Milwaukee,* 7 Cir. 1979, 599 F.2d 151, 162-63.

animous Court, Mr. Justice Douglas stated, "When we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . ." *Id.* at 103. Furthermore, the Supreme Court repeatedly expressed its intention to extend the application of federal common law to public nuisances caused by the pollution of either "interstate or navigable waters." *Id.* at 99, 102, 104.

In view of the obvious interstate character of Lake Michigan, we are not so bold as to assume that Mr. Justice Douglas might have been careless in his choice of words and that other members of the Court failed to notice implications of the term "navigable waters". In addition, so the Court stated, federal common law would apply regardless of the jurisdictional amount, *id.* at 98, or of the "character" of the parties, *id.* at 105 n.6. "[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." *Id.* The Court noted the existence of the Federal Water Pollution Control Act and was aware of the interstices and deficiencies in federal statutes.

> It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution . . . There are no fixed rules that govern; these be equity suits in which the informed judgment of the chancellor will largely govern.

Id. at 107.

The Court's use of the term "navigable waters" significantly suggests the breadth of the holding,[14] for

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[14] The legislative history of the 1972 amendments to the FWPCA demonstrates that Congress intended the term "navigable waters" to be given an expansive interpreta-

that term includes both the territorial seas and purely intrastate waters having no necessary interstate impact. The Federal Water Pollution Control Act applies to "interstate or navigable waters", and this Court has recently noted that "[i]n applying the federal common

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[14] (Continued)
tion: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 1236, 92d Cong., 2d Sess. 144, *reprinted in* [1972] U.S. Code Cong. & Ad. News 3776, 3822. Judge Butzner, dissenting in *Committee for the Consideration of the Jones Falls Sewerage System* v. *Train,* 4 Cir. 1976, 539 F.2d 1006, 1011, emphasized the point:

> The legislative history [of the Water Pollution Act] discloses that Congress intended the term 'navigable waters" to "be given the broadest possible constitutional interpretation. . . ." Referring to this history, the Environmental Protection Agency has interpreted the statutory definition to include "tributaries of navigable waters of the United States."

The Environmental Protection Agency provides the following definition for "navigable waters":

> (t) "Navigable waters" means "waters of the United States, including the territorial seas." This term includes:
>
> (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) Interstate waters, including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

law of nuisance in a water pollution case, a court should not ignore the Act but should look to its policies and principles for guidance". *Illinois* v. *Milwaukee,* 7 Cir. 1979, 599 F.2d 151, 164; *accord, Committee for the Consideration of the Jones Falls Sewerage Sys.* v. *Train,* 4

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[14] (Continued)

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs ((t)(1)-(4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (t)(1)-(5) of this section ("Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds); *provided that* waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States. [Emphasis in original].

Navigable waters include: a non-navigable tributary of a navigable stream (*United States* v. *Ashland Oil & Transp. Co.,* 6 Cir. 1976, 504 F.2d 1317); non-tidal mangrove swamps (*P.F.Z. Properties, Inc.* v. *Train, D.D.C. 1975,* 393 F.Supp. 1370); and non-navigable mosquito canals (*United States* v. *Holland,* M.D. Fla. 1974, 373 F.Supp. 665).

Cir. 1976, 539 F.2d 1006, 1013 (Butzner, J., dissenting). There is no language in the Supreme Court's opinion to suggest that the predicate for the decision is one state's adversely affecting the environment or ecology of another. That sort of extraterritorial effect may often occur when an interstate body of water is polluted, but the Court's express language seems to base the holding on the national interest in "interstate or navigable waters". States have, of course, an interest in waters within their borders, but "it is federal, not state, law that in the end controls the pollution of interstate or navigable waters". *Id.* at 102. "Thus, the Supreme Court in *Illinois* v. *Milwaukee* intended to do more than merely provide a forum for controversies between states". Note, *Federal Common Law Remedies for the Abatement of Water Pollution*, 5 Fordham Urb. L.J. 549, 557 (1977). Basically, the Supreme Court established, under federal common law, a right in tort for the pollution of interstate and navigable waters.

Pollution of any large lake or long river body of water has, of course, obvious interstate effects. Fish swim. As the Supreme Court pointed out, the "demands for applying federal law are present in the pollution of a body of water such as Lake Michigan, bounded, as it is, by four states". 406 U.S. at 105 n.6. But the term "interstate or *navigable* waters" encompasses all federal waters, even tributaries of intrastate navigable waters. (Emphasis added). Federal concern is not just in navigability but in the purity and quality of the waters. This is reflected in the expanded concept of "navigable waters".[15] It is explicit in the goal of the 1972 Amendments "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C. § 1251(a). States too have a stake in clean water. It is in keeping therefore with the national program of protecting federal waters for the states to be allowed to sue one who has committed the federal tort of polluting federal waters

[15] *See* footnote 14.

within the state or on which the state borders. The applicable law, however, is federal and it should be uniform.[16] The following provisions of the 1972 amendments to the Federal Water Pollution Control Act show the national policy favoring uniformity: 33 U.S.C. § 1241 (a) (establishing national goals for the elimination of pollution); § 1316(c) (allowing state enforcement if its standards comply with federal regulation): § 1319(a)(2) (allowing the Administrator to enforce pollution limitations if a state defaults); § 1370 (providing that no state standard may be less stringent than the federal regulations).

Two courts of appeals have recognized that the federal common law gave rise to a cause of action on the facts presented in *Illinois* v. *Milwaukee,* but concluded that the federal common law should not be applied to intrastate pollution of navigable waters. *Reserve Mining Co.* v. *Environmental Protection Agency,* 8 Cir. 1975, 514 F.2d 492; *Committee for the Consideration of the Jones Falls Sewerage Sys.* v. *Train,* 4 Cir. 1976. 539 F.2d 1006.

In *Reserve Mining,* the court construed *Illinois* v. *Milwaukee* as applying only to instances when the pollution source of one state harmed the environment of an-

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[16] We interpret the Supreme Court's discussion of uniformity in *Illinois* v. *Milwaukee,* 406 U.S. at 105 n.6, to envision a uniform floor. Obviously, a state's pollution control effort in interstate waters could be hampered by another state's lax pollution regulations. Development of a federal common law of nuisance to enforce certain standards can help alleviate this problem. If a state wants to undertake more stringent pollution control than that offered by federal statutes or common law, it can look to its own statutes and common law. The FWPCA makes clear that Congress does not intend to preempt a state's efforts at more stringent pollution control. 33 U.S.C. § 1370. *See Illinois* v. *Milwaukee,* 7 Cir. 1979, 599 F.2d 151, 162; *United States Steel Corp.* v. *Train,* 7 Cir. 1977, 556 F.2d 822, 835-36, 837-38.

other. The court found that the evidence showed that the polluted air in Minnesota villages was affected only by the waste emanating from Minnesota; there were no extraterritorial pollutive effects. Accordingly, the court rejected the federal common law nuisance action to prevent the air pollution.

The Fourth Circuit reached a similar result in *Jones Falls*. There a group of Maryland residents living near Jones Falls sought to enjoin the grant of new sewerage hookups to the existing Baltimore sewerage system which was already dumping a substantial amount of raw sewerage into Jones Falls. Jones Falls is an intrastate navigable waterway. The court refused to apply federal common law since there was no interstate controversy. In a strong dissent, *id.* at 1010 (Butzner, J. dissenting), Judge John Butzner, relying on *Illinois* v. *Milwaukee*, urged that the national interest in keeping all navigable waters clean gave rise to a federal common law action of nuisance enforceable by a private citizen, as contemplated by the 1972 amendments. The dissent also reasoned that the protection of such interstate resources as Chesapeake Bay could best be achieved by preventing the discharge of pollutants into tributaries, whether intrastate or interstate navigable waters.

Those two decisions are distinguishable in that in each case the court found that the pollution had only an intrastate effect. Here, of course, the four states bordering on Lake Michigan are all affected, although only Illinois has sued OMC. But we do not base our decision on this distinction. With due deference to the courts deciding those cases, we disagree with the rationale they adopted. As we read *Illinois* v. *Milwaukee*, the Supreme Court explicitly recognized a federal common law action to abate pollution in "interstate or navigable waters". There is no basis for putting a gloss on the Supreme Court holding that would restrict its application to situations in which one state complains of damages to its environment or ecology by a pollution source in another state.

Although we have never decided whether such a suit can be brought, we did come to the edge of the question in *Stream Pollution Control Board* v. *United States Steel Corp.*, 7 Cir. 1975, 512 F.2d 1036. There an Indiana administrative body attempted to use federal common law to abate pollution of the Grand Calumet River, a navigable stream and tributary of Lake Michigan. We refused to decide whether the complaint stated a cause of action for which relief could be granted, but did hold that "the complaint raises substantial questions which only a federal court may finally answer". *Id.* at 1040. We commented that "[s]urely enough has been alleged to give the district court jurisdiction to decide whether the Board is entitled to some relief as a matter of federal common law". *Id.*

In another case a district court allowed Illinois and the United States jointly to maintain a federal nuisance action against United States Steel Corporation, restraining it from discharging wastes into Lake Michigan from its Waukegan, Illinois plant. *United States ex rel. Scott* v. *United States Steel Corp.*, N.D. Ill. 1973, 356 F.Supp. 556. The complaint had no allegation of an out-of-state effect. The court held that the 1972 amendments of the Federal Water Pollution Control Act did not oust the federal courts from their federal common law jurisdiction; they amplify and supplement existing remedies. The court noted the federal government's "undoubted right to intervene to protect the navigable waters from pollution" and the "obvious interest" of Illinois in the "purity and recreational value of Lake Michigan". *Id.* at 558.

In *United States* v. *Ira S. Bushey & Sons, Inc.*, D.Vt. 1972, 346 F.Supp. 145, *aff. mem.* 2 Cir. 1973, 487 F.2d 1393, *cert. denied*, 1974, 417 U.S 976, 94 S.Ct. 3182, 41 L.Ed.2d 1146, the federal district court refused to dismiss the federal government's claim grounded in the federal common law of nuisance though its complaint asserted no interstate effect. The court said that the

United States may sue to protect the "national interest in the quality of air and water in their ambient or interstate aspects". *Id.*. at 149.

In this suit we again have pollution of Lake Michigan. We again have pollution of an interstate body of water, fed by many tributaries. One state's lax pollution standards should not prevent vigorous efforts by the federal government and by other states to prevent pollution of Lake Michigan. Forbidding Illinois to invoke federal nuisance law would create the anomaly that three states bordering Lake Michigan may sue to prevent pollution emanating from Illinois, but Illinois itself may not bring such an action.

There are several practical reasons for giving Illinois the right to sue in federal court. First, let us assume that there are two plants, one on each side of the Illinois-Wisconsin border, each pouring the same type of pollution into Lake Michigan. OMC's contention would require Illinois to file one suit in Illinois court and one in federal court. Each polluter could argue that most or all of the pollution harming Illinois is coming from the other plant, and therefore that Illinois should not be granted an injunction. Bringing a single action against both defendants in one forum would prevent them from hiding behind each other. Second, allowing suit here could promote economy of judicial administration as well as uniformity in result. Aside from allowing Illinois to sue in-state and out-of-state polluters in the same suit, it would allow a state and the federal government to sue together to prevent pollution in that state. In this controversy, we have Illinois's suit in federal court, a subsequent federal government suit in federal court, a suit by OMC against the Environmental Protection Agency to decide what remedial steps, if any, should be taken to remedy sediments in Waukegan Harbor and the North Ditch, and an Illinois administrative proceeding initiated by OMC concerning the appropriate terms and conditions for a permit for the Waukegan facility. Ad-

ditionally, Illinois could file suit in state court against OMC under its statutes and the common law of nuisance. Permitting Illinois to sue OMC in federal court under the federal common law of nuisance would allow consolidation of the suits brought by the United States and by Illinois (and possibly the suits brought by OMC), thus conserving scarce judicial resources and ensuring a single result. Multiple suits may lead to contradictory results, thus necessitating more litigation to sort out all of the inconsistencies. Third, permitting a state to sue in federal court could ensure that competition for industry between states does not prevent vigorous state enforcement against pollution. If a state develops a strong state common law of nuisance and enforces it vigorously, industry may flee to another state. If, on the other hand, a state sues in federal court and aids development of a comprehensive federal law of nuisance, the law can be enforced against polluters no matter where the pollution originates.

National uniformity of pollution standards finds partial legislative expression in the 1972 amendments, which provide for promulgation of pollution guidelines and require federal approval of state discharge permits. There is no serious conflict, however, between the states and the federal government. Consistent with the amendments' avowed purpose of preserving and protecting the primary responsibilities of the states, *see* 33 U.S.C. § 1251(b), the states may impose more restrictive standards than those imposed by the federal government.

We conclude, based on *Illinois* v. *Milwaukee* and the Federal Water Pollution Control Act, that there is an overriding federal interest in preserving, free of pollution, our interstate and navigable waters. When a pollution controversy arises, it is immaterial whether there is a showing of extraterritorial pollution effects. The issue is whether the dispute is a matter of federal concern. When it is, as in this case, federal courts should be accessible. The effect of the federal common law of

nuisance is to fill the statutory interstices and to provide uniformity in controlling water pollution in either interstate or navigable waters or the United States. There is no strain on federalism. The State of Illinois and the federal government see eye to eye and in *United States* v. *OMC* are attempting to work shoulder to shoulder to their mutual interest in clean water.

II.

Illinois urges three grounds for intervention in the suit by the United States against OMC, only the first of which we need consider. Fed.R.Civ.P. 24(a)(1) allows intervention "when a statute of the United States confers an unconditional right to intervene". *See generally* C. Wright & A. Miller, 7A Federal Practice and Procedure § 1906 (1972).

The FWPCA provides for intervention in the following circumstance:

> (b) No action may be commenced—
>
> (1) under subsection (a)(1) of this section—
>
> (b) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

33 U.S.C. § 1365(b)(1)(B). A "citizen" is "a person or persons having an interest which is or may be adversely affected.". *Id.* § 1365(g). A "person" includes a state. *Id.* § 1362(5); *see Massachusetts* v. *United States Veterans Administration*, 1 Cir. 1976, 541 F.2d 119, 121 n.1. The terms "standard" and "limitation" are defined in § 1365; these include "effective July 1, 1973, an unlawful act under subsection (a) of section 1131 of [the FWPCA]". 33 U.S.C. § 1365(f)(1). Section 1311(a) provides: "Except as

in compliance with this section and sections 1312, 1316, 1317, 1328, 1372, and 1344 of this Act, the discharge of any pollutant by any person shall be unlawful." Count II of the complaint alleges that "OMC's continuing discharge of PCB was not in compliance with Section 402 of the [Clean Water] Act, 33 U.S.C. 1342, and therefore violated the prohibition of Section 301(a) of the [Clean Water] Act, 33 U.S.C. 1311(a)."

OMC argues, first, that there can be no violation absent promulgation of an effluent standard or limitation by E.P.A. and specific inclusion of such standard or limitation in a permit. *Stream Pollution Control Bd.* v. *United States Steel Corp.*, 7 Cir. 1975, 512 F.2d 1036, 1042. That case did not involve an alleged violation of § 402; it involved a violation of the federal common law of nuisance and of § 1311, which provides a timetable for the promulgation of various effluent limitations. Because the deadline had not passed in that case, the intervenors' only statutory argument was that the steel facility could not discharge any pollution until the standard had been promulgated. The Court rejected that argument, stating that the defendant was in compliance with the statute unless it violated a statutory provision, and that it could not violate a standard before the standard was established. The express congressional goal of step-by-step reduction of pollution makes it unlikely and illogical that Congress intended to prohibit all pollution until the standard were fixed. The present suit does not charge a violation of any standards; instead, it involves a violation of a permit issued by the Environmental Protection Agency. This Court has held that promulgation of a separate effluent standard or limitation is not a prerequisite to enforcement of a permit under § 1342. "The obligations imposed on an individual discharger by the permit are enforceable according to the statutory timetable whether or not they are based on previously issued guidelines." *United States Steel Corp.* v. *Train*, 7 Cir. 1977, 556 F.2d 822, 854-55.

Second, OMC cites a recent case in which this Court held that the citizen suit provision "does not provide for suits against parties alleged to have violated an effluent standard or limitation in the past or for recovery of damages". *Evansville* v. *Kentucky Liquid Recycling, Inc.*, 7 Cir. 1979, 604 F.2d 1008, 1014. This suit alleges current PCB pollution. Admittedly, the federal government seeks only an injunction to require dredging because it has instituted administrative proceedings to deal with present PCB pollution by OMC. The complaint, however, states that the injunctions sought are designed to prevent further contamination of the bodies of water, and it leaves the door open for the court to grant "such other and further relief as it deems just and proper". Besides, once the federal government asserts that PCB is a dangerous substance and that OMC is currently discharging a dangerous amount of PCBs, parties that are affected by this pollution should have a right to intervene to seek abatement even if the federal government is principally concerned with past pollution. *Evansville* does not forbid intervention to halt continuing or future violations.

The right of the State of Illinois to intervene is both practical and desirable. Congress made clear in the FWPCA that the states have a vital role in the elimination of pollution: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). The Illinois Environmental Protection Agency has been given the power to issue permits under § 1342, the section at issue in this case. That agency must also certify approval or waive any objection before the dredging requested by the federal government can take place. *Id.* § 1341; *see Minnesota* v. *Hoffman*, 8 Cir. 1976, 543 F.2d 1198, 1204. State law requires permits for dredging, *see* Ill. Rev. Stat. ch. 19, § 65, and for water pollution control devices, *see* Ill. Rev. Stat. ch. 111½, §§ 1012(b) & 1039. On Intervention of Illinois, the court will be able to consider

interests and views of the State, and perhaps simplify and shorten subsequent state procedures.

Because we hold that the FWPCA allows intervention of right, we need not consider whether Illinois has a right to intervene because of its special interest, *see* Fed. R. Civ. P. 24(a)(2), or whether permissive intervention is proper, *see* Fed. R. Civ. P. 24(b).

III.

Illinois asked to intervene in the federal suit after its own suit was dismissed. On oral argument its attorney was unsure whether it would want to remain in the federal suit if its suit was revived. The choice is of course up to Illinois. If both suits are pursued, we leave to the sound discretion of the district court the decision whether the actions should be consolidated.

These cases are REVERSED and REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 29, 1980.
Before
Hon. LUTHER M. SWYGERT, Circuit Judge*
Hon. JOHN MINOR WISDOM, Senior Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

No. 79-1341

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

vs.

OUTBOARD MARINE CORPORATION, INC.,
a Delaware corporation,
Defendant-Appellee.

No. 79-1725

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OUTBOARD MARINE CORPORATION,
Defendant and Third-Party
Plaintiff-Appellee and

MONSANTO COMPANY,
Third Party Defendant.

Appeal Of: PEOPLE OF THE STATE
OF ILLINOIS,
Proposed Intervenor.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 78-C-3187 and 78-C-1004
FRANK J. MCGARR, *Judge.*

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation. Judge Wisdom did not participate in the vote on the petition for rehearing in banc.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendant-appellee Outboard Marine Corporation, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

In connection with the court's consideration of the petition for rehearing and suggestion for rehearing in banc, the panel requested that the other active members of the court vote on the question of whether they wished a rehearing in banc on the matter of the inconsistency between the opinion of the panel and the opinions of the Fourth and Eight Circuits in *Reserve Mining Co.* v. *Environmental Protection Agency* and *Committee for the Consideration of the Jones Falls Sewerage Sys.* v. *Train.* No judge voted in favor of rehearing in banc. Accordingly, the opinion issued March 28, 1980, is amended by inserting an asterisk at the end of the 21st line on page 12 and adding the following footnote on that page:

> In connection with the court's consideration of the petition for rehearing and suggestion for rehearing in banc, the above opinion was circulated among all judges of this court in regular active service. No judge favored a rehearing in banc on the matter of the conflict between the reasoning of this opinion and the reasoning of the Fourth and Eighth Circuits in the *Jones Falls* and *Reserve Mining* cases.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

OUTBOARD MARINE CORPORATION,
Defendant.

No. 78 C 1004

MEMORANDUM OPINION AND ORDER

This action was brought by the United States Attorney (hereinafter, "government") on behalf of the Environmental Protection Agency. The People of the State of Illinois (hereinafter, "state") have filed a motion seeking leave to intervene. For the reasons that follow, the state's motion is denied.

The government's complaint, filed March 17, 1978, alleges that the defendant, Outboard Marine Corporation (hereinafter, "OMC"), discharged polychlorinated biphenyl ("PCB") into Waukegan Harbor, Lake Michigan, and the North Ditch, a tributary ditch of Lake Michigan. This discharge has allegedly contaminated the bottom sediments of those waters. The government seeks: 1) an order requiring OMC to dredge and dispose of the contaminated sediments in the North Ditch; 2) an order requiring OMC to conduct a study of the safest way to remove and dispose of the contaminated sediments in Waukegan Harbor and Lake Michigan, and thereafter to remove and dispose of those sediments; 3) civil penalties; 4) the costs of this action; and, 5) such other relief as the court deems proper.

In June, 1978, OMC filed a motion to dismiss, which was denied. *See United States* v. *Outboard Marine Corp.*, No. 78 C 1004 (N.D. Ill. Oct. 4, 1978) (Memorandum Opinion and Order). In August, 1978, the State of Illinois brought an action against OMC, alleging basically the same facts

as has the government, but seeking broader relief, *e.g.*, an injunction prohibiting further discharges. The state's complaint was dismissed. *See People of the State of Illinois* v. *Outboard Marine Corp.*, No. 78 C 3187 (N.D. Ill. Feb. 28, 1979) (Memorandum Opinion and Order), *appeal docketed*, No. 79-1341 (7th Cir. March 30, 1979). The state then filed this motion to intervene, asserting intervention as of right, and, alternatively, permissive intervention. An analysis of the state's arguments follows.

The state first asserts a right to intervene pursuant to Rule 24(a)(1), Fed.R.Civ.P., which provides, "Upon timely application anyone shall be permitted to intervene in an action: 1) when a statute of the United States confers an unconditional right to intervene. . . ." The state relies on §505(b)(1)(B) of the Federal Water Pollution Control Act (hereinafter, "FWPCA"), 33 U.S.C. §1365(b)(1)(B) (1976), as its statutory basis for intervention as of right. That section provides:

> No action may be commenced—
>
> • • • •
>
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
> 33 U.S.C. §1365(b)(1)(B) (1976).

Section 505(f) of the FWPCA defines "effluent standard or limitation:"

> For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of

this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).
33 U.S.C. §1365(f) (1976).

The government's complaint alleges violations of sections 1311 and 1342. Thus, violations of a standard or limitation are at issue in this suit. The question here, however, is whether the government's action is one to "require compliance" with a standard, limitation, or order. In other words, does the phrase, "require compliance" embrace relief redressing past violations or does it refer only to prospective relief?

As far as this court can determine, this is a case of first impression. There appear to be no cases directly on point; nor is the Act's legislative history helpful.

The state contends that this is an action "to require compliance" by arguing that the imposition of civil penalties is a way of enforcing, and thereby requiring compliance with, the standard, limitation, or order. The state also argues that an order to remove and dispose of the PCB-contaminated sediments will assure future compliance because it is clear that OMC will remain liable for any future discharges. The court rejects both of these arguments.

Compliance means conformance. Webster's Third New International Dictionary 465 (1963). To require is to demand or insist upon. *Id.* at 1929. Thus to require compliance with the standard, limitation, or order is to demand that discharges conform with the norms specified by the FWPCA. This court does not agree that the imposition of civil penalties or an order to remove contaminated sediments is a way to demand that OMC conform with the discharge specifications of the Act. Indeed, civil penalties and the removal of the sediments may deter any future unlawful discharge; hence, they encourage compliance. Encouraging compliance, however, is not requiring compliance.

The state also argues that the government's prayer for such other relief as the court deems proper includes the possibility of an order enjoining future discharges of contaminants. The court rejects this argument. The government obviously elected to seek relief only for past violations. The insertion of this standard language in the prayer for relief is insufficient to convert this action into one seeking to require compliance with the discharge standards of the Act.

Had Congress intended to grant intervention as of right in all suits brought by the Administrator under the Act, it could have so worded §505(b)(1)(B). Given the specific language that Congress used, it is apparent that Congress intended to grant intervention as of right only in suits brought to require compliance. This court holds that an action to redress past violations is not one to require compliance. Accordingly, the state has no statutory right to intervene in this case.

The state's second basis for intervention as of right is Rule 24(a)(2), Fed.R.Civ.P., which grants intervention of right "when the applicant claims an interest relating to the property . . . which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." To intervene of right under this rule, the state must meet all of these conditions. *Reedsburg Bank* v. *Apollo,* 508 F.2d 995, 997-98 (7th Cir. 1975). The inquiry here can begin with the adequacy of representation by the government.

The burden of showing inadequacy of representation rests on the state. *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n. 10 (1972). Although this burden "should be treated as minimal" *id.,* it must still be met. "Representation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the representative does not

fail in the fulfillment of his duty." *United States* v. *Board of School Commissioners,* 466 F.2d 573, 575 (7th Cir. 1972), *cert. denied sub nom. Citizens of Indianapolis for Quality Schools, Inc.* v. *United States,* 410 U.S. 909 (1973).

The state has not shown any collusion between the government and an opposing party. Nor is there a showing that the government has or represents an interest adverse to the state. Finally, there has been no showing that the government has or may fail in fulfilling its duty. The state, therefore, has failed to meet its burden here and may not intervene as of right under Rule 24(a)(2), Fed.R.Civ.P.

The state's final basis for intervention is Rule 24(b), Fed.R.Civ.P., which authorizes permissive intervention. This lies within the court's discretion. "It may be denied if the [proposed] intervenor raises collateral or extrinsic issues, even though the petition presents a common question of law or fact." *City of Rockford* v. *Secretary of Housing and Urban Development,* 69 F.R.D. 363, 366 (N.D. Ill. 1975) (citing 3B Moore's Federal Practice ¶24.10[4], at 24-394 (2d ed. 1978)). The state's Complaint in Intervention lists five counts, four of which raise issues of state law. The adjudication of these issues would unduly delay the course of this litigation. Accordingly, this court denies the state's motion for permissive intervention.

The motion of the People of the State of Illinois for leave to intervene is, therefore, denied.

ENTER /s/ Frank J. McGarr
United States District Judge

DATED: May 29, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

OUTBOARD MARINE CORPORATION, INC.,
a Delaware corporation,
Defendant.

No. 78 C 3187

MEMORANDUM OPINION AND ORDER

The Attorney General of the State of Illinois has brought this action on behalf of The People of Illinois. The defendant, Outboard Marine Corporation ("OMC"), has filed a motion to dismiss for lack of subject matter jurisdiction (Rule 12(b)(1), Fed.R.Civ.P.), for failure to state a claim upon which relief may be granted (Rule 12(b)(6), Fed.R.Civ.P.), and for failure to join necessary parties (Rule 12(b)(7), Fed.R.Civ.P.). Defendant's motion is granted.

Outboard Marine Corporation owns and operates a facility in Waukegan, Illinois, where it manufactures outboard motors and their component parts. The complaint alleges that, from 1959 until the present, OMC's hydraulic system has leaked and spilled polychlorinated biphenyls which are ultimately discharged into Lake Michigan, a tributary ditch to Lake Michigan, and Waukegan Harbor. This discharge has allegedly contaminated the bottom sediments of these waters. The complaint alleges violations of federal and state laws.

This court must first determine whether it has jurisdiction over the subject matter, for if jurisdiction is lacking, the action must be dismissed. *Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F.2d 1036, 1039 (7th Cir. 1975).

The six-count complaint bases federal jurisdiction on the federal common law of nuisance (Count I), the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§1251-1376 (1976) (Count II), and the doctrine of pendent jurisdiction (Counts III-VI).

OMC argues that this court lacks subject matter jurisdiction because this action involves no controlling questions of federal law. The first contention is that Count II, the FWPCA claim, must be dismissed because of the plaintiff's failure to comply with the notice provision set forth in §505(b) of the FWPCA. That section provides that no citizen may bring a civil action against an alleged violator:

> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
>
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
>
> 33 U.S.C. §1365(b) (1976).

Section 505(g) defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §1365(g) (1976). Because the Attorney General has brought this action on behalf of The People of Illinois, he is a citizen for the purposes of this section. Thus, he must comply with the statutory requirements. *Accord, Commonwealth of Massachusetts* v. *United States Veterans Administration,* 541 F.2d 119, 121 n. 1 (1st Cir. 1976).

The law in this circuit is that such a notice provision is jurisdictional. *See City of Highland Park* v. *Train,* 519 F.2d 681, 690-91 (7th Cir. 1975), *cert. denied,* 424 U.S.

927 (1976), in which the Seventh Circuit Court of Appeals held that a similar provision under the Clean Air Amendments of 1970, 42 U.S.C. §1857h-2(b), was jurisdictional.

The plaintiff has not shown that he has given the required sixty-day notice to the Administrator or to the defendant. Consequently, the jurisdictional requirement has not been fulfilled and Count II must be dismissed.

Count I is based on the federal common law of nuisance. OMC reasserts its argument raised in *United States* v. *Outboard Marine Corp.*, No. 78 C 1004 (N.D.Ill. filed March 17, 1978), that the 1972 Amendments to the FWPCA pre-empted the federal common law of nuisance. Nothing in the FWPCA evidences an intent to pre-empt. This court will not presume that Congress wished to pre-empt the federal common law of nuisance in amending the FWPCA. *Accord, Illinois* v. *City of Milwaukee,* 366 F.Supp. 298, 301 (N.D.Ill. 1973), *on remand from* 406 U.S. 91 (1972); *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F.Supp. 110, 119-20 (D.Vt. 1972), *aff'd.*, 487 F.2d 1393 (2d Cir. 1973). There is indeed federal jurisdiction over a claim based on the federal common law of nuisance. *Stream Pollution Control Board* v. *United States Steel Corp.,* 512 F.2d 1036, 1039-40 (7th Cir. 1975). In this case, however, the federal common law of nuisance count is inadequate.

Illinois v. *City of Milwaukee,* 406 U.S. 91 (1972), is the leading case involving federal nuisance claims for water pollution. Unlike the instant case, that action involved a dispute between Illinois and out-of-state polluters (which were cities in a neighboring state). In recognizing the existence of a federal common law of nuisance, the Supreme Court both implicitly and expressly noted the polluters' out-of-state character. For example, the Court relied heavily on earlier cases involving disputes between states. *See* 406 U.S. at 103-07. Further, the Court noted that the federal common law should be "a basis for dealing in uniform standard with the environmental rights of a State against improper impairment *by sources outside its domain.*" 406 U.S. at 107 n. 9 (emphasis added).

Those courts that have applied the federal common law of nuisance in pollution cases generally have done so only when the alleged pollution comes from an out-of-state source or there is a substantial federal issue involved. *See Committee for Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1009 (4th Cir. 1976); *Parsell* v. *Shell Oil Co.,* 421 F.Supp 1275 (D.Conn. 1976), *aff'd. sub nom East End Yacht Club, Inc.* v. *Shell Oil Co.,* 573 F.2d 1289 (2d Cir. 1977).

This case involves a controversy between two Illinois residents. There is no allegation of injury to or from another state. As such, the federal common law of nuisance count fails to state a claim upon which relief may be granted. Count I, therefore, is dismissed.

Counts III-VI are based on state law. Because both federal claims have been dismissed, the doctrine of pendent jurisdiction is inapplicable. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 725 (1966). Counts III-VI are dismissed.

In sum, defendant's motion to dismiss Counts II, III, IV, V, VI for lack of subject matter jurisdiction is granted. Count I is dismissed for failure to state a claim upon which relief may be granted.

ENTER /s/ Frank J. McGarr
United States District Judge

DATED: February 28, 1979

No. 80-126

SEP - 2 1980

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OUTBOARD MARINE CORPORATION,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS, UNITED STATES OF AMERICA,

and

MONSANTO COMPANY,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS

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No. 80-126

IN THE

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MONSANTO COMPANY,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTIONS PRESENTED

1. Whether Congress in the Clean Water Act has preempted the entire field of federal common law of nuisance as it applies to pollution of interstate navigable waters.

2. Whether the jurisdiction of a district court to hear a claim based on federal common law of nuisance is dependent on the geographical location of the parties.

3. Whether a state can intervene as of right or as matter of discretion in an action brought by the United States under the Clean Water Act alleging continuing pollution when the United States has not specifically asked the court to enjoin future discharges.

4. Whether a state can bring a federal common law of nuisance action when the United States has instituted an action under the Clean Water Act.

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OPINION BELOW

The opinion of the court of appeals is reported as *People of the State of Illinois* v. *Outboard Marine Corp.*, 619 F.2d 623 (7th Cir. 1980)

ADDITIONAL STATUTES INVOLVED

28 U.S.C. § 1331(a)

§ 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States,. . . .

Rule 24(a) and (b), Federal Rules of Civil Procedure.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order,

requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT OF THE CASE

On August 10, 1978, the People of the State of Illinois ("State" or "Illinois") filed suit in United States District Court for the Northern District of Illinois against Outboard Marine Corporation ("OMC"), a Delaware corporation with facilities located in Waukegan, Illinois, some ten miles south of the Wisconsin border. The complaint alleged that from 1959 through 1978 OMC discharged highly toxic polychlorinated biphenyls ("PCBs") from its facility into the North Ditch, Waukegan Harbor and Lake Michigan, interstate and navigable waters. It alleged that these PCBs had accumulated in the bottom sediments of the receiving waters (which Illinois owns in trust for the people) comprising as much as 25 per cent of these sediments. It further alleged that OMC's pollution damaged water quality, and aquatic and bird life (which Illinois also owns in trust for the people), harmed the health and welfare of the people and impaired the usefulness of Waukegan Harbor and Lake Michigan as public water supplies and recreation areas for citizens of Illinois and of the other states surrounding Lake Michigan. (R1, Item 1)[1]

The complaint alleged two federal claims—federal common law of nuisance and the Clean Water Act, 33 U.S.C. § 1251 *et seq.* Jurisdiction was invoked under 28 U.S.C.

[1] As used herein "R1" refers to the record in the first appeal (Seventh Circuit No. 79-134), "R2" refers to the record in the second appeal (Seventh Circuit No. 79-1725), and "App." refers to Petitioner's Appendices.

§ 1331(a) and 33 U.S.C. § 1251 *et seq.* Illinois also included several pendent state claims. On motion of OMC the court dismissed the action. (App. D-1) It dismissed the claim under the Clean Water Act on the ground that Illinois had not given sixty days notice of the suit. See 33 U.S.C. § 1365(b)(1)(A). (App. D-3) The federal common law of nuisance count was dismissed for failure to state a claim because there was "no allegation of injury to or from another state." (App. D-4) Illinois filed a timely appeal in the court of appeals pursuant to 28 U.S.C. § 1291 on the nuisance claim but did not appeal the dismissal of the Clean Water Act claim. (R1, Item 23)

When Illinois' own suit was dismissed, the State petitioned to intervene in a suit filed on March 17, 1978, by the United States against OMC, then pending before the same district judge (the two cases had been previously consolidated for discovery). The United States' suit alleged basically the same facts as Illinois' suit and was based on the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*, the Clean Water Act, and federal common law of nuisance. (R2, Item 1) Although alleging continuing pollution, the United States' prayer for relief only asked for the specific relief of studies and dredging of the contaminated sediments. OMC's motion to dismiss had earlier been denied. (R2, Item 21) Illinois claimed intervention as of right under the Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) and thus under Rule 24(a)(1) of the Federal Rules of Civil Procedure, intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and permissive intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure. (R2, Item 59) The district court rejected Illinois' claims on all three grounds. (App. C-1) Illinois filed a timely appeal in the court of appeals pursuant to 28 U.S.C. § 1291. (R2, Item filed January 22, 1979) The two appeals were consolidated by the court on its own motion. The United States filed an amicus curiae brief in support of Illinois' intervention. On February 28, 1980, a unanimous panel of the

court reversed and remanded in both cases. 619 F.2d at 623. OMC's motion for rehearing and suggestion for rehearing in banc was denied on April 29, 1980. (App. B-1) OMC filed its petition for writ of certiorari on July 28, 1980.

REASONS FOR DENYING THE WRIT

The court of appeals in a well-reasoned opinion thoroughly considered the issues raised and reached a correct decision. As is discussed below, the reasons OMC advances in support of the writ do not result from the court's decision and are not sufficient grounds for this court to grant a writ of certiorari to review the Seventh Circuit's decision.

I.

THE ISSUES PRESENTED IN THIS CASE ARE NOT RIPE FOR SUPREME COURT REVIEW.

The action brought by Illinois in the district court was dismissed on the pleadings on the ground that the complaint failed to state a claim upon which relief could be granted. (App. D-4) Illinois' claim was grounded in federal common law of nuisance and alleged that from 1959 through 1978 OMC discharged highly toxic polychlorinated biphenyls ("PCBs") into the North Ditch, Waukegan Harbor and Lake Michigan. (R1, Item 1, pp. 1-5) In its prayer for relief it requested the court to enjoin further discharges and to order OMC to remove contaminated sediments in these polluted bodies of water. (R1, Item 1, pp. 13-15) The dismissal was reversed by the court of appeals and the cause was remanded for trial. 619 F.2d at 632.

Since 1978 the suit brought by the United States against OMC has been pending before the same district judge. That action is grounded in part on federal common law of nuisance and alleges the same basic facts as are alleged in Illinois' suit. (R2, Item 1) (This is the action in which Illinois attempted to

intervene when its own suit was dismissed.) OMC's motion to dismiss was denied in that case and the case continues. (R2, Item 21) As is discussed more fully below, there are no specific federal or state effluent standards governing OMC's discharges of PCBs. Much of the relief sought is not based in statute. As the Court recognized in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), it will be up to the district judge to formulate the standards to be applied in this situation and to fashion appropriate equitable relief. 406 U.S. at 103 n.5 and at 108 n.10.

On this review all this Court can decide are narrow legal issues based solely on the pleadings. The issues of whether the discharge of PCBs have created a public nuisance, of what effect this pollution has had, of what standards should apply, of where the equities lie and of what relief is appropriate cannot be decided here.

It would promote judicial economy for the Court to deny its writ of certiorari at this time. The district judge will make his ultimate decision in the ongoing federal case (in which Illinois is now an intervenor as a result of the Seventh Circuit's decision) based on the same allegations, evidence and arguments as he would in Illinois' case. (At this time the two cases have been consolidated for discovery [R2, Order dated October 12, 1978] and the judge has indicated that he will consolidate them for trial [R2, Item 21, pp. 7-8].) Once the district judge has heard the evidence and arguments of the various parties and reached a decision, the case would be in a position for this Court to review all the issues raised. To grant a writ of certiorari now would be to grant only peicemeal review.

II.

THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE ANY CONFLICT WITH CONGRESSIONAL POWERS.

Since *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), the federal courts have developed a specialized common law "when there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism." *Illinois* v. *Milwaukee,* 406 U.S. at 105 n.6. Most often the courts have developed this common law to fill interstices in various types of federal legislation. See Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U.L.Rev.383 (1964) and Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U.Pa.L.Rev.797 (1957).

In *Illinois* v. *Milwaukee* this Court formulated a federal common law of public nuisance for pollution of interstate or navigable waters. The Court examined the various federal statutes and found that Congress had not provided the relief sought by Illinois for pollution of Lake Michigan, 406 U.S. at 103. But as the Court recognized, this does not limit the relief a federal court can grant, 406 U.S. at 103—citing *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457 (1957).

The Court recognized that Congress could at some future time preempt the entire field of federal common law of nuisance, 406 U.S. at 107. It found that Congress had not done so. In an air pollution case decided the same day the Court recognized that Congress could preempt certain areas of federal common law of nuisance and not others. *Washington* v. *General Motors Corp.,* 406 U.S. 109 (1972). Indeed, that is the main function of federal common law, to fill in the gaps.

OMC devotes several pages of its Petition in describing the intricacies of the Clean Water Act. Nowhere can it find any express intent to preempt the federal common law of nuisance—there is none. The intent of Congress is just the opposite. Since this Court's 1972 decision in *Illinois* v. *Milwaukee*, Congress has enacted two major amendments to the Clean Water Act, in 1972 (P.L. 82-500) and in 1977 (P.L. 95-217). In the 1972 amendments Congress created an express private right of action, the Citizen Suit provision. 33 U.S.C. § 1365. It was reenacted in the 1977 amendments. In doing so Congress included a savings clause which expressly preserved all common law right:

> (e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).
> 33 U.S.C. § 1365(e)

Congress could not have been more clear.

Despite the unequivocal language of the statute, OMC argues that the Clean Water Act somehow implies that Congress intended to preempt federal common law of nuisance. As this Court has noted: "the legislative grant of a new right does not ordinarily cut off or preclude other non-statutory rights in the absence of clear language to that effect." *Federal Maritime Terminals, Inc.* v. *Burnside Shipping Co.* 394 U.S. 404, 412 (1969). The clear language of Congress in the Clean Water Act is just the opposite from what OMC argues.

OMC never identifies what specific provisions of the Clean Water Act this lawsuit conflicts with because there is no conflict. In its Petition it admits: "there have never been effluent standards governing the discharge of PCBs from an aluminum die case facility. . . ." (OMC's Petition, p. 2) Illinois' complaint alleges that from January 1, 1959, to August 10, 1978, OMC discharged highly toxic PCBs into the North Ditch, Waukegan

Harbor and Lake Michigan. It prayed that further discharges be enjoined and that OMC be ordered to remove the contaminated sediments. The 1972 and 1977 amendments to the Clean Water Act do not directly address OMC's pollution prior to that time. There have never been any specific effluent standards for OMC's discharges of PCBs. The relief sought by Illinois is not provided for in federal statutes. The National Pollutant Discharge Elimination System ("NPDES") permit program was not enacted until 1972, and OMC's first NPDES permit was not issued until 1975.[2] Perhaps the Clean Water Act provides Illinois a remedy for current violations (though OMC has not stated how), but it provides none to remedy the effects of OMC's past pollution. This situation falls within the same sort of gap in federal legislation as was present in *Illinois* v. *Milwaukee.*

Despite the involvement of an exotic toxic chemical, what Illinois has brought is an action in public nuisance, an action known to the Anglo-American courts for centuries. It is probably the only remedy the state has. The case arises under federal law because it involves pollution of interstate and navigable waters. *Illinois* v. *Milwaukee.* The decision below does not conflict with anything Congress has promulgated; as Judge Wisdom wrote for the court below, the very purpose of such an action is to "fill the statutory interstices and to provide uniformity in controlling water pollution in either interstate or navigable waters. . . ." 619 F.2d at 630.

OMC's argument that the court of appeals' decision violates separation of powers and infringes on the power of Congress rests on nothing. There is no conflict. There is no

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[2] Interestingly, OMC's current NPDES permit, which allows no discharge of PCBs, is being appealed by OMC before a state administrative agency on the ground, among others, that there can be no PCB limit in the permit because there are no state or federal effluent standards for PCBs applicable to OMC. *OMC* v. *Illinois Environmental Protection Agency,* filed with the Illinois Pollution Control Board (Docket No. 79-141) on July 11, 1979.

usurption of Congressional power. There is no need for this Court to grant its writ of certiorari; this matter belongs before the district court where, based on the law and evidence, it can decide this case.

III.

THERE IS NO ACTUAL CONFLICT BETWEEN THE HOLDING OF THE SEVENTH CIRCUIT AND THOSE OF THE FOURTH AND EIGHTH CIRCUITS.

OMC urges this Court to exercise its discretion to review the Seventh Circuit's decision because of what it claims is a conflict among the circuits. That conflict is more illusory than real. The two cases cited by OMC, *Committee for the Consideration of Jones Falls Sewage System* v. *Train,* 539 F.2d 1006 (4th Cir. 1976) and *Reserve Mining Co.* v. *EPA,* 514 F.2d 498 (8th Cir. 1975), are easily distinguishable. The Seventh Circuit recognized the significant differences: "Those two decisions are distinguishable in that in each case the court found that the pollution had only an intrastate effect. Here, of course, the four states bordering on Lake Michigan are all affected ...." 619 F.2d at 629.

The differences between the cases are significant. In *Jones Falls* there was no allegation of any effect outside of Maryland, 539 F.2d at 1009, nor was there any evidence of extra-territorial harm, 539 F.2d at 1009. Here Illinois alleged the pollution of the North Ditch, Waukegan Harbor and Lake Michigan, interstate and navigable waters. (R1, Item 1, pp. 3-5) As well as alleging injury to the state, Illinois also alleged that OMC's pollution has seriously impaired the usefulness of Waukegan Harbor and Lake Michigan as public water supplies and as places of recreation for other states as well. (R1, Item 1, paragraphs 6, 7, 8, and 17.) These factors were not present in *Jones Falls.* Additionally, *Jones Falls* involved private plaintiffs. 539 F.2d at 1007. The court gave great weight to the lack

of any rights of a state being involved. 539 F.2d at 1010. Here, of course, the plaintiff is the State of Illinois alleging injury to its quasi-sovereign rights and to its citizens.

Reserve Mining is similarly distinguishable. That court found that there was no allegation of any interstate effect of the air pollution complained of in that case. 514 F.2d at 520-521. Here there are allegations of interstate pollution. In a factual situation more similar to OMC, pollution of Lake Superior, the Eighth Circuit chose not to decide the issue of federal common law nuisance, but relied solely on the Federal Water Pollution Control Act (Clean Water Act). 514 F.2d at 532.

There is no conflict between the holding of the Seventh Circuit and the holdings of the Fourth and Eighth Circuits. This court should not grant its writ of certiorari to review hypothetical disagreements among the circuits or conflicts in dicta.

IV.

THE SEVENTH CIRCUIT'S DECISION DOES NOT BROADEN THE JURISDICTION OF THE DISTRICT COURTS.

The decision below does not extend the decision of this Court in *Illinois* v. *Milwaukee,* but is entirely consistent with it. There is only one factual difference between the two cases—the geographical location of the polluter. The plaintiff is the same, the State of Illinois. The claim is the same, water pollution. The same federal interest in uniformity is present. Even the water is identical, Lake Michigan. An accident of geography (OMC is located approximately 10 miles from the Wisconsin border) does not determine whether an action arises under the laws of the United States. Indeed, in *Illinois* v. *Milwaukee* the federal court has jurisdiction because of the federal interest in providing uniformity and consistency in controlling water pollution in interstate and navigable waters, not because of the

geographical location of the parties. The same basis of jurisdiction exists here. OMC's argument that something like diversity must exist leads to absurd results and defeats the uniformity described by the Court in *Illinois* v. *Milwaukee*. It would indeed be anomolous if state law applied to pollution of Lake Michigan if Illinois sues but federal law applies if Wisconsin sues for the same pollution. The decision does not expand the jurisdiction of the district courts under 28 U.S.C. § 1331(a).

Yet OMC sees the Seventh Circuit's decision as opening the federal courts to any sort of pollution case. Its absurd example is a person suing his neighbor over smoke from a barbecue grill. (OMC's Petition, P. 22) Despite OMC's interpretation, the court below certainly did not hold that "all air and navigable water pollution cases involve a federal question." (OMC's Petition, p. 23) The court's holding is significantly narrower.

Most obviously this case does not deal with air pollution. However one might want to speculate about the limitations of federal common law of nuisance of air pollution, there was no allegation of air pollution, no evidence as to air pollution and no decision of either the district court or the court of appeals as to air pollution. That question was not raised in this case and cannot properly be before this Court.

Secondly, the decision below has nothing to do with whether any person can sue anyone for pollution. This is an action grounded in a traditional Anglo-American tort—public nuisance. Over the centuries the courts have developed limitations as to who can bring such an action. Certainly a state can. That is what the court decided. 619 F.2d at 623-624. Whether a person other than a state may bring such an action was not before the court and was not decided by it.

Nor does the decision below preempt all state pollution laws as OMC claims (OMC's Petition, p. 23). This was not an issue below; Illinois has no specific effluent standards governing

discharge of PCBs. Federal common law of nuisance is intersticial—it fills in the gaps in Congress' enactments. As such it can no more preempt state law, common law or statutory, than the federal statute which it complements. It is clear that Congress, which could have displaced federal common law of nuisance and could have preempted conflicting state laws, has specifically not done so. The Clean Water Act allows a state to adopt, by statute, regulation or common law decision, and to enforce more stringent standards than the federal ones. 33 U.S.C. § 1370. The Seventh Circuit's decision has no effect on that.

The possible effects of the decision below are much narrower than OMC advances. Since *Illinois* v. *Milwaukee* was decided in 1972, there have not been many reported cases involving the federal common law of nuisance of water pollution; Illinois doubts that the Seventh Circuit's decision will add many more. Certainly the decision does not expand the jurisdiction of district courts and will not result in the dire consequences OMC predicts. The decision does not open the federal courts to any pollution case brought by any plaintiff against any defendant. For these reasons the Court should not grant a writ of certiorari to review this matter.

V.

THE SECOND APPEAL PRESENTS NO ISSUE SIGNIFICANT ENOUGH TO WARRANT SUPREME COURT REVIEW.

In the second of these two consolidated appeals the court of appeals held that Illinois had a right under the Clean Water Act and F.R.Civ.P. 24(a)(1) to intervene in the suit brought by the United States against OMC. The question presented was a very narrow one and the holding is confined to the facts of that case. The Clean Water Act allows a citizen, such as Illinois, to intervene as of right when the United States has brought an

action to require compliance with a standard, limitation or order established under the Clean Water Act. 33 U.S.C. § 1365(b)(1)(B). The United States alleged that OMC was violating such a standard or limitation. The only real question arose because, although the United States had alleged continuing pollution, it had not specifically prayed that the court enjoin these ongoing discharges but had asked that OMC be ordered to remove contaminated sediments from the North Ditch and Waukegan Harbor. The narrow question decided was whether the wording of the prayer for relief meant that the action was one "to require compliance." The court of appeals held that the wording of the prayer for relief did not prevent the action from being one "to require compliance" and that Illinois did have a statutory right to intervene under the Clean Water Act. 619 F.2d at 630-632. It did not hold as OMC claims that any person has a right to intervene in any action brought by the United States. The issue was very narrow and will probably never reoccur. OMC admits that what it is asking is for this Court to interpret "boilerplate" language in the complaint filed by the United States. See OMC's Petition, p. 27. The question is not important enough for this Court to review.

The Seventh Circuit was clearly correct in its decision. Because it decided the issue on the ground of intervention as of right under the Clean Water Act and F.R.Civ.P. 24 (a)(1), it did not reach the alternate grounds advanced by Illinois, intervention as of right under Rule 24(a)(2) or by permission under Rule 24(b)(2). Although the court of appeals did not have to reach these issues, its discussion of the practicability and desirability of Illinois' intervention in the suit indicates that it may well have sustained intervention on these alternate grounds. See 619 F.2d at 631-632. The court pointed out that state-issued permits would be necessary to accomplish the relief sought by the United States. 619 F.2d at 632. (Indeed, the United States prayed that any dredging be approved by the Illinois Environmental Protection Agency, [R2, Item 1, pp. 7-

8].) When to this is added Illinois' ownership of the submerged lands in question (43 U.S.C. § 1311) and its role as trustee of these lands for the benefit of the people *(Illinois Central Railroad Co.* v. *State of Illinois,* 146 U.S. 387 [1892], *People ex rel. Scott* v. *Chicago Park Dist.,* 66 Ill.2d 65, 360 N.E.2d 773 [1976], and Ill. Rev. Stat. 1977, ch. 19, § 150-151), Illinois' intervention would have been properly allowed on these alternate grounds.

As a final issue in this second appeal, OMC claims that the court of appeals erred in allowing the state to pursue its own independent common law action as well as to intervene in the statutory one brought by the United States. (OMC's Petition, pp. 28-30) Its argument is without any merit. The citizen suit provision of the Clean Water Act does prohibit a person from filing his own suit if the United States has initiated an action (but the citizen can then intervene as of right). 33 U.S.C. § 1365. However, as is clear from the statute, in such circumstances the citizen cannot initiate his own action *under that section;* there is no bar to any other type of action. The provision specifically states that "nothing in this section shall restrict any right which any person (or class of persons) may have under any statute *or common law* to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." 33 U.S.C. § 1365(e) [emphasis supplied] By its own terms the Act permits simultaneous actions—one brought by the United States under the Clean Water Act and another brought by a citizen under common law. The court of appeals properly allowed Illinois to intervene in the suit brought by the United States and to maintain its own common law action. The decision of the court was entirely consistent with the statute.

As discussed above, the Seventh Circuit's decision in the second appeal was correct, would be sustained on alternate grounds and is fair. There is no issue in this case significant enough for this Court to review. The writ should be denied as to the second appeal.

CONCLUSION

For the foregoing reasons the People of the State of Illinois submits that the Court should deny the writ of certiorari.

Respectfully submitted

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August 27, 1980

FILE
SEP 26
MICHAEL RODAK, J

No. 80-126

In the Supreme Court of the United States

OCTOBER TERM, 1979

OUTBOARD MARINE CORPORATION, PETITIONER

v.

PEOPLE OF THE STATE OF ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the Clean Water Act preempts the federal common law of nuisance in respect of pollution of interstate and navigable waters.

2. Whether a state may invoke the federal common law of nuisance to remedy an in-state discharger's pollution of interstate and navigable waters.

3. Whether the court of appeals correctly permitted the State of Illinois to intervene as of right pursuant to Section 505(b)(1)(B) of the Clean Water Act, 33 U.S.C. 1365(b)(1)(B), in a suit brought by the federal government under the Act.

4. Whether a state may pursue independently its rights and remedies under the Clean Water Act and the federal common law of nuisance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 619 F. 2d 623. The opinions of the district court (Pet. Apps. C and D) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1980. A petition for rehearing was denied on April 29, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on July 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the interlocutory decision of the court of appeals regarding the right of respondent State of Illinois to maintain a federal common law nuisance action and to intervene in an ongoing Clean Water Act suit brought by the United States concerning the same controversey.

1. In March 1978, the United States filed suit in the United States District Court for the Northern District of Illinois, seeking to remedy petitioner's past discharges of polychlorinated biphenyls ("PCB's") into North Ditch (a tributary feeding Lake Michigan), Waukegan Harbor, and Lake Michigan. The government asked the district court to order petitioner to dredge and dispose safely of the PCB-contaminated sediments and to pay civil penalties. Relief was sought pursuant to the Refuse Act, 33 U.S.C. 407; the Clean Water Act, 33 U.S.C. 1251 *et seq.*; and the federal common law of nuisance. The district court denied petitioner's motion to dismiss this suit (*United States* v. *Outboard Marine Corp.*, 12 E.R.C. 1346 (N.D. Ill. 1978)), and the parties are currently pursuing pretrial discovery in this action. Trial is expected to commence early next year.

In August 1978, respondent Illinois filed a similar action against petitioner based on the federal common law of nuisance, the Clean Water Act, and state law. The district court dismissed this suit (Pet. App. D-1 to D-4). In particular, the court held that although the Clean Water Act had not preempted the federal common law of nuisance, the federal common law did not govern suits by a state regarding pollution from an in-state source, even if that pollution had interstate effects (*id.* at D-3 to D-4). In addition, the court dismissed Illinois' Clean Water Act suit for failure to comply with the 60-day notice requirement set forth in 33 U.S.C. 1365(b)(1)(A) (see Pet. App. D-2 to D-3),[1] and it likewise dismissed the remaining state law claims for lack of jurisdiction (*id.* at D-4).

Relying primarily on Section 505(b)(1)(B) of the Act, 33 U.S.C. 1365(b)(1)(B), and Rule 24(a)(1) of the Federal Rules of Civil Procedure, Illinois thereafter moved to intervene in the federal government's suit against petitioner. The district court agreed that Section 505(b)(1)(B) gives any citizen or state an absolute right to intervene in a suit brought by the federal government "to require compliance" with the Act. It concluded, however, that the federal suit does not constitute an action "to require compliance," because the government sought merely to redress past violations rather than to achieve future compliance (Pet. App. C-2 to C-4). Accordingly, the district court denied the motion to intervene.

2. Illinois then appealed both the order dismissing its own suit and the order denying its motion to intervene in the federal suit. The court of appeals reversed (Pet. App. A-1 to A-20). The court first concluded that Illinois may

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[1]Illinois did not contest this ruling on appeal (Pet. App. A-3).

invoke the federal common law as a remedy against the pollution of interstate or navigable waters regardless of the location of the polluter. The court observed that in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court repeatedly emphasized that the federal common law of nuisance concerns the pollution of "interstate *or navigable* waters" (Pet. App. A-7 to A-8, A-11, quoting 406 U.S. at 99, 102, 104 (emphasis supplied)). The court of appeals pointed out that this broad application of the federal common law of nuisance is consistent with the intent of Congress reflected in the language and legislative history of the Clean Water Act and with the interstate nature of water pollution (Pet. App. A-8 to A-12). Moreover, the court rejected decisions of the Fourth and Eighth Circuits suggesting a narrower scope of the federal common law (Pet. App. A-12 to A-13). See *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492 (8th Cir. 1975); *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F. 2d 1006 (4th Cir. 1976). The court noted (Pet. App. A-13) that in any event

> [t]hose two decisions are distinguishable in that in each case the court found that the pollution had only an intrastate effect. Here, of course, the four states bordering on Lake Michigan are all affected * * *.

The court of appeals also held that Illinois had a right to intervene in the federal government's Clean Water Act suit. The court explained that Section 505(b)(1)(B) expressly provides for intervention in a suit brought by the United States to require compliance with the Act, including a suit concerning the clean up of current PCB pollution (Pet. App. A-17 to A-19). Such intervention, the court observed, was consistent with the Act's policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

eliminate pollution" (Pet. App. A-19, quoting 33 U.S.C. 1251(b)).

DISCUSSION

1. Petitioner primarily contends (Pet. 5-17) that the Clean Water Act, 33 U.S.C. 1251 *et seq.*, preempts the federal common law of nuisance regarding the pollution of interstate and navigable waters. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). That issue is currently before the Court in *City of Milwaukee* v. *People of the State of Illinois*, cert. granted, No. 79-408 (Mar. 17, 1980). For the reasons stated in our amicus curiae brief in that case, we believe that the courts below correctly rejected petitioner's claim.[2] Nonetheless, because the issue is now pending before the Court, it may be appropriate to defer disposition of this petition pending the decision in *City of Milwaukee* v. *People of the State of Illinois, supra*.[3]

2. The other issues raised by petitioner do not warrant review by this Court. At the outset, we note that the court of appeals' decision is interlocutory in nature and that review is unwarranted at this time. See, *e.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1961). Indeed, further litigation may well moot some or all of the issues posed by petitioner.[4] In addition, development of the facts of this case will

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[2]A copy of our brief in *City of Milwaukee* has been sent to counsel for petitioner.

[3]We note that the decision below is interlocutory in nature and that the litigation concerning petitioner's discharge of PCB's is now ongoing in the district court. Accordingly, the Court could properly deny this petition, permitting the lower courts to apply the subsequent decision in *City of Milwaukee* in the first instance.

[4]For example, petitioner may prevail on the merits of one or both suits.

illuminate petitioner's contention (Question 2) regarding the scope of the federal common law of nuisance. In any event, as we briefly demonstrate below, the decision of the court of appeals is correct.

a. Petitioner argues (Pet. 17-23) that the federal common law of nuisance does not apply to suits between a state and a citizen of that state, even if the pollution affects interstate or navigable waters. But in *Illinois* v. *City of Milwaukee, supra*, which also involved the pollution of Lake Michigan, this Court repeatedly emphasized that the federal common law applies to the pollution of all "interstate or navigable waters." See 406 U.S. at 99, 102, 104. And, contrary to petitioner's suggestion (Pet. 21), application of the federal common law in this case does not depend on "the character of the parties." 406 U.S. at 105 n.6. In short, where, as here, plaintiffs allege that the pollution affects interstate and navigable waters, there is a federal common law remedy. Accord, *National Sea Clammers Ass'n* v. *City of New York*, 616 F. 2d 1222, 1233-1234 & n.35 (3d Cir. 1980), petitions for cert. pending, Nos. 79-1711, 79-1754, 79-1760 and 80-12; *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275, 1281 (D. Conn. 1976), aff'd mem., 573 F. 2d 1289 (2d Cir. 1977); *United States* v. *Ira S. Bushey & Sons,* 346 F. Supp. 145, 149 (D. Vt. 1972), aff'd mem., 487 F. 2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1974).[5]

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[5]To be sure, as petitioner notes (Pet. 17-19), the court below disagreed with decisions of the Fourth and Eighth Circuits suggesting that federal common law does not apply to local pollution controversies involving no allegations of interstate effects (Pet. App. A-13). See *Reserve Mining Co.* v. *EPA*, 514 F. 2d 492, 520-521 (8th Cir. 1975); *Committee for the Consideration of the Jones Falls Sewage System* v. *Train*, 539 F. 2d 1006, 1008 (4th Cir. 1976). But, as the court of appeals further pointed out, *Reserve Mining* and *Jones Falls* "are distinguishable in that in each case the court found that the

b. Petitioner further contends (Pet. 24-28) that the court of appeals improperly permitted Illinois to intervene in the suit brought by the United States alleging petitioner's noncompliance with the Clean Water Act. Rule 24(a)(1) of the Federal Rules of Civil Procedure provides, however, that "anyone shall be permitted to intervene in an action * * * when a statute of the United States confers an unconditional right to intervene." Section 505(b)(1)(B) of the Clean Water Act, in turn, states that any citizen, including a state, "may intervene as a matter of right" in any action "to require compliance" with the standards and limitations set in accordance with the Act. See 33 U.S.C. 1365(b)(1)(B). And, as the court of appeals concluded, nothing in the broad language or legislative history of Section 505 suggests that Congress sought to preclude citizen intervention in a suit brought to remedy continuing noncompliance with the Act, merely because noncompliance is based on past discharges (Pet. App. A-18 to A-20). That decision does not conflict with any decision of this Court or of any court of appeals, and further review is unwarranted.[6]

c. Finally, petitioner claims that Section 505(b)(1)(B) precludes an independent citizen's suit where, as here, the federal government is already diligently prosecuting an action to secure compliance with the Act. Therefore, in

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pollution had only an intrastate effect" (Pet. App. A-13). See also *Ancarrow* v. *City of Richmond*, 600 F. 2d 443, 445 (4th Cir. 1979). Here, of course, Illinois and the federal government alleged that petitioner's discharges are affecting, *inter alia*, Lake Michigan—a body of water that this Court has expressly found to be governed by the federal common law of nuisance. See 406 U.S. at 105 n.6.

[6]Illinois also sought to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) and as a matter of discretion under Fed. R. Civ. P. 24(b). The court of appeals did not rule on these points (Pet. App. A-20).

petitioner's view, the court of appeals erroneously permitted Illinois both to intervene and to pursue its common law suit. But Section 505(b)(1)(B) merely precludes a citizen from bringing a suit "under [Section 505](a)(1)" of the Act when the government is already suing to secure compliance with the Act. See 33 U.S.C. 1365(b)(1)(B). Illinois' independent suit is, of course, based on the federal common law and thus is plainly not governed by the terms of Section 505(b)(1)(B).

CONCLUSION

The Court may wish to defer consideration of Questions 1 and 2 of the petition for a writ of certiorari pending the decision in *City of Milwaukee* v. *People of the State of Illinois*, cert. granted, No. 79-408 (Mar. 17, 1980). In all other respects, the petition should be denied.

Respectfully submitted.

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